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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT LILLIS, LEONARD PASTORE, ANTHONY DILULLO and MARY FISH-MACDONALD,

Petitioners,

v.

ANTHONY GOLINO,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state court's finding of probable cause for arrest, following an adversarial hearing challenging the arrest, is entitled to preclusive effect in a subsequent action under 42 U.S.C. § 1983 based on a claim of malicious prosecution.

2. Whether denying summary judgment to police officer defendants on a malicious prosecution claim under 42 U.S.C. § 1983 violates the standard for qualified immunity established in *Malley v. Briggs*, 475 U.S. 335 (1986) where: (a) the officers prepared an arrest warrant affidavit in consultation with, and at the direction of, an assistant state's attorney who had been kept apprised of the investigation; (b) the affidavit, if corrected to include alleged material omissions and exclude alleged material falsehoods, would sustain a reasonable officer's belief in the existence of probable cause; and (c) a state court judge found probable cause to prosecute the plaintiff after a post-arrest evidentiary hearing at which witnesses whose statements provided the basis for the affidavit were cross examined regarding alleged omissions and falsehoods.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled matter on December 3, 1991, and the order of that court entered on February 7, 1992, denying a petition for rehearing.

OPINIONS BELOW

The opinion of the court of appeals in this matter is reported at 950 F.2d 864 and is reprinted in the Appendix to this petition (1a).[1]

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[1] References in this petition appear as follows:

To the numbered pages of the Appendix to this petition: (—a);

To the numbered pages of the Joint Appendix filed in the Court of Appeals: (— JA);

The memorandum of decision of the United States District Court for the District of Connecticut (Cabranes, J.) is reported at 761 F. Supp. 962 and is reprinted in the Appendix (16a).

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. § 1983, respondent brought this action in the United States District Court for the District of Connecticut. On April 18, 1991 the district court granted in part, and denied in part, a joint motion of defendants, including petitioners, for summary judgment. 761 F. Supp. 962 (16a).

Petitioners appealed that portion of the district court's order denying summary judgment, and the Court of Appeals for the Second Circuit affirmed the district court's decision by opinion dated December 3, 1991. 950 F.2d 864 (1a). Petitioners filed a petition for rehearing with suggestion for rehearing *en banc*, which the court of appeals denied by order dated February 7, 1992 (38a). On March 13, 1992 the court of appeals issued its mandate (40a).

Petitioners invoke the jurisdiction of this Court to review the judgment of the court of appeals pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Title 42, United States Code, Section 1983

> *Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall*

To the order denying rehearing and the court of appeals' mandate are not reported, but are reprinted in the Appendix at 38a, 40a).

be liable to the party injured in an action of law, suit or equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Respondent's claims arise from an eleven year investigation by the City of New Haven, Connecticut Police Department into the murder of Concetta "Penny" Serra (Serra). 761 F.Supp. 962 (16a). The investigation led to respondent's arrest on July 3, 1984 pursuant to a warrant for murder. *Id.* at 964 (17a). Petitioners each participated in the investigation (33-43 JA). At the direction of Assistant State's Attorney Mary Galvin (ASA Galvin), petitioners DiLullo and Pastore prepared and executed the affidavit in support of the arrest warrant (38 JA). ASA Galvin signed the arrest warrant application (38, 372-83 JA). On July 3, 1984, ASA Galvin submitted the affidavit and warrant to a Connecticut Superior Court judge who issued the warrant that same day. 761 F.Supp. at 964 (17a). Among the factors which led to respondent's arrest was his own statement to the police that he had Type "O" blood—the type Serra's murderer was believed to have had (338-39, 377 JA).

In August, 1984, pursuant to Connecticut General Statutes § 54-46a, the State commenced a preliminary hearing to determine probable cause before Connecticut Superior Court Judge Frank Kinney. During the ensuing nine day evidentiary hearing, respondent, exercising his statutory right, cross examined each of the State's witnesses extensively. Prior to Judge Kinney's ruling, respondent filed a detailed, written "Offer of Proof" pursuant to Connecticut General Statutes § 54-46a(b) (442-45 JA). The Offer of Proof identified eight witnesses and described the evidence respondent would present to rebut a finding of probable cause. Specifically, respondent offered to rebut the State's evidence regard-

ing his blood type and the State's eyewitness identifications. On the latter point, respondent stated he would produce Gary Hryb, a witness whose lineup identification inculpated one Philip DiLieto rather than respondent (443 JA).

The state court concluded at the close of the hearing that the "State has met its burden," and that "probable cause "has been shown." (111 JA). The court denied respondent's request to present defense evidence, stating that it did so only after having "carefully considered the accused's . . . [filed] offer of proof." (124 JA). The court explained:

> [e]ven assuming that the accused were able to offer evidence, as he claims he would in the offer of proof, the Court's conclusion is that such evidence would not be sufficient to rebut the evidence the Court has heard and has found to be sufficient to establish probable cause for the offense of murder.

Id.

The prosecution progressed until the eve of trial on May 15, 1987, when a court-ordered blood test was taken over respondent's objection. The test revealed that respondent's blood type was not "O" as respondent had previously indicated, but was instead Type "A." 761 F.Supp. at 964 (17a). Immediately upon learning this information, the prosecution filed a nolle prosequi and the court dismissed the case. *Id.*; (42 JA).

On January 5, 1988, respondent commenced this action in the United States District Court for the District of Connecticut seeking money damages under 42 U.S.C. § 1983 for alleged violations of his civil rights in connection with the Serra murder investigation. In his complaint, respondent named the City of New Haven, its Chief of Police (William Farrell), respondent's former wife (Joyce Lupone), four of the City's investigating officers (petitioners Lillis, Pastore, DiLullo and Fish-MacDonald) and ten unidentified city or state police officers designated as John Doe defendants (8 JA).

Respondent alleged four theories of recovery: (1) a conspiracy between defendant Lupone and the other defendants to violate his civil rights; (2) arrest with excessive force; (3) malicious prosecution; and (4) municipal supervisory liability on the part of the City of New Haven and Chief Farrell (8-23 JA). Default was entered against defendant Lupone on May 23, 1988 (1 JA).

In August 1990, the municipal defendants, including petitioners, moved for summary judgment on various grounds including: (1) the finding of probable cause in the underlying state prosecution foreclosed re-litigation of that issue in connection with respondent's malicious prosecution claim; and (2) because their conduct in respondent's arrest and prosecution was objectively reasonable, they were qualifiedly immune to suit. On April 18, 1991, the district court granted summary judgment against respondent on the wrongful arrest, excessive force, conspiracy and supervisory liability claims, thereby disposing of all claims against defendants Lupone, the City of New Haven and Chief Farrell. 761 F.Supp. 962 (16a). However, the district court rejected the collateral estoppel and qualified immunity defenses, thereby denying summary judgment to petitioners on the malicious prosecution claim. *Id.*

Petitioners appealed that portion of the district court's order denying summary judgment, arguing that the court erred in concluding that: (1) respondent had been denied an adequate opportunity to litigate the issue of probable cause in the underlying criminal proceeding; and (2) there were genuine issues of material fact to be tried in connection with the immunity defense, particularly the issue of whether it was objectively reasonable for petitioners to have believed they had probable cause for respondent's arrest and prosecution.

After first determining that it had jurisdiction to consider the appeal,[2] the court of appeals addressed the merits of the petitioners' defenses. With respect to the collateral estoppel question, the court concluded that the 1984 state court probable cause hearing "did not provide Golino a full and fair opportunity . . . to litigate the issue of probable cause." 950 F.2d at 870 (10a). The court so held despite the Offer of Proof submitted by the accused and the absence of any claim that petitioners had deliberately presented false testimony at the hearing.

Specifically, the court pointed to what it characterized as "limitations on Golino's ability to present his own evidence and to gain access to undisclosed significant facts" in the police investigative file. *Id.* In addition, the court reasoned that the "purpose" of a statutory probable cause hearing "is generally the evaluation of the 'sufficiency of the evidence' to constitute probable cause, not the integrity of the evidence." *Id.* at 869 (*quoting*, *Schertz v. Waupaca County*, 875 F.2d 578, 581 (7th Cir. 1989)) (10a).

With respect to the qualified immunity defense, the court cited both this Court's decision in *Malley v. Briggs*, 475 U.S. 335, 341 (1986) and the court of appeals' de-

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[2] Because the district court had denied a summary judgment motion raising a substantial claim of qualified immunity, petitioners sought immediate appellate review under the doctrine of *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). The court of appeals concluded that because the district court had "ruled that the resolution of [the] probable cause issues involved questions of fact, the ruling is not, in principle, immediately appealable." 950 F.2d at 868 (7a). Nevertheless, the court held that because the collateral estoppel question involved a "purely legal ruling" which "affects whether qualified immunity is available as a matter of law," and because of "the close relationship between the collateral estoppel issue . . . and the merits of the probable cause issues" it would exercise its "discretion" to review the district court's rulings on both the collateral estoppel question and the probable cause-immunity question. *Id.*

cision in *Magnotti v. Kuntz*, 918 F.2d 364, 368 (2d Cir. 1990). These decisions hold that where an affidavit in support of an arrest lacks probable cause, officers who prepared the affidavit are nonetheless qualifiedly immune to suit under 42 U.S.C. § 1983 unless "the warrant application is so lacking in probable cause as to render official belief in its existence unreasonable. . . ." *Malley*, 475 U.S. at 345; *accord*, *Magnotti*, 918 F.2d at 368. This standard applies even where a plaintiff claims that officers deliberately and maliciously omitted information from an affidavit. *Magnotti*, 918 F.2d at 368.

Notwithstanding this established legal standard, the court of appeals rejected respondents' qualified immunity defense, not because the claimed omissions and misrepresentations in the arrest warrant affidavit made it "*so lacking* in probable cause as to render official belief in its existence unreasonable," *Malley*, 475 U.S. at 345 (emphasis added), but because the allegedly deliberate omissions "*were not immaterial* to [the] question [of] probable cause as a matter of law." 950 F.2d 872 (14-15a) (emphasis added).

In addition, despite the undisputed evidence that in obtaining the arrest warrant petitioners had consulted with and relied upon the advice of an Assistant State's Attorney, and each of the claimed omissions were brought to the attention of the state court judge during the nine day probable cause hearing, the court of appeals concluded that summary judgment was "properly denied" since the district court "could not rule as a matter of law that it was objectively reasonable for [petitioners] to believe there was probable cause for the arrest and prosecution of Golino." *Id.*

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW THAT A STATE COURT DETERMINATION FOLLOWING AN ADVERSARIAL HEARING WAS NOT PRECLUSIVE IN A SUBSEQUENT ACTION UNDER 42 U.S.C. § 1983 INVOLVES IMPORTANT ISSUES REGARDING THE APPLICATION OF THIS COURT'S DECISION IN *ALLEN v. McCURRY*, 449 U.S. 90 (1980)

This case presents a significant question regarding the application of this Court's decision in *Allen v. McCurry*, 449 U.S. 90 (1980) to wrongful arrest and prosecution claims under 42 U.S.C. § 1983. The case also presents an opportunity to establish a clear standard for avoiding needless re-litigation of issues already determined by state courts initially reviewing the challenged arrest.

This Court has held that under the full faith and credit mandate of 28 U.S.C. § 1738, the federal courts "must give to a state court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 81 (1984).

Thus, under 28 U.S.C. § 1738, a previous state court determination which otherwise meets the appropriate state law test for issue preclusion must be given preclusive effect in a federal civil rights action brought under 42 U.S.C. § 1983. *Allen v. McCurry*, 449 U.S. at 104. In *Allen*, this Court held that a state court ruling denying a pre-trial motion to suppress precludes relitigation of fourth amendment issues in a subsequent Section 1983 action.

The Court noted two significant policies underlying this rule:

> . . . res judicata and collateral estoppel not only reduce unnecessary litigation and foster reliance on adjudication, but also promote the comity between state

> and federal courts that has been recognized as a bulwark of the federal system.

Id. at 95-96.

A previous state court determination will not bar relitigation of issues where the state "does not provide fair procedures for the litigation of constitutional claims, or where a state court failed to even acknowledge the existence of the constitutional principle on which a litigant based his claim." *Id.* at 101. However, this Court has held that:

> State proceedings need do no more than satisfy the minimum procedural requirements of the . . . Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law.

Kremer v. Chemical Construction Corp., 456 U.S. 461, 481 (1982). This standard is consistent with the standard set forth in the *Restatement (Second) of Judgments* (1982):

> . . . [A] refusal to give the first [determination] preclusive effect should not occur without a compelling showing of unfairness. . . .

Id. § 328 comment. *Accord, P.X. Restaurant, Inc. v. Town of Windsor*, 189 Conn. 153, 161-62, 454 A.2d 1258 (1983) (setting forth requirements of issue preclusion under Connecticut law).

In the proceedings below, petitioners argued that one necessary element of respondent's malicious prosecution claim—lack of probable cause to maintain a prosecution for murder—had previously been determined by a state court finding to which full faith and credit should be given: namely, the 1984 finding, following a nine day adversarial hearing, that the State of Connecticut had probable cause to prosecute respondent. Despite the fact that respondent exercised his statutory right to file an offer of proof, the court of appeals held the state court finding did not deserve preclusive effect because "the 1984 state hearing entailed procedural limitations that

curtailed Golino's efforts to secure the full and fair litigation of the probable cause issue." 950 F.2d at 869 (10a).

In refusing to give preclusive effect to the prior state court finding of probable cause, the court of appeals imposed several restrictions on Section 1983 defendants which are not only inconsistent with the function of preliminary criminal proceedings, but are inconsistent with the policy that federal courts should afford due regard for state court findings absent a "compelling showing" of unfairness.

First, in identifying what it concluded had been "procedural limitations" on respondent in the state court proceeding, the court of appeals applied a novel legal standard in Section 1983 cases: that for collateral estoppel purposes, a state's statutorily mandated adversarial probable cause proceeding falls outside the "fair and full opportunity" test if the proceeding is designed to evaluate the "sufficiency" rather than the "integrity" of the prosecution's evidence. *Id.* at 543 (*quoting*, *Schertz v. Waupaca County*, 875 F.2d at 581 (10a)). Yet such a standard, which has never been addressed or adopted by this Court, would provide Section 1983 claimants challenging a previous state criminal prosecution with a virtual carte blanche to re-litigate any issue previously determined in a probable cause proceeding. Indeed, the traditional mechanism for post-arrest review of probable cause, unlike a trial on guilt or innocence, requires the prosecution merely to present evidence "sufficient to cause . . . a reasonable belief of the accused's guilt," not evidence that would be admissible at trial or which otherwise has "integrity." *Coleman v. Burnett*, 477 F.2d 1187, 1202 (D.C. Cir. 1973) (no error in limiting defense cross-examination in preliminary hearing). Evaluating the "fairness" of the previous hearing by this "integrity" standard was particularly inappropriate in this case since respondent does not claim that the state court's finding of probable cause was induced by the prosecution's deliberate use of known false or perjurious testimony (8 JA).

Secondly, in adopting its "procedural limitations" test, the court below also relied on a factor not previously deemed relevant in evaluating the fairness of a prior proceeding for collateral estoppel purposes: namely "limitations" on the accused's "ability" "to gain access to undisclosed significant facts" in the police investigative file. 950 F.2d at 870 (10a). Like the "integrity" of evidence requirement the court of appeals engrafted onto the collateral estoppel defense, this factor also would unnecessarily deprive state court preliminary hearings of preclusive effect in subsequent Section 1983 actions. Under the court of appeals' analysis, regardless of the opportunities to challenge police credibility actually exercised at the prior hearing and the absence of any taint of perjury, arresting officers are not entitled to the collateral estoppel defense without first establishing that the accused had "access" to their files at the time of the earlier proceeding. But since discovery of prosecution evidence is not among the traditional purposes of the preliminary hearing, *see Sciortino v. Zampano*, 385 F.2d 132, 134 (2d Cir. 1967), *cert. denied*, 390 U.S. 906 (1968), this factor, if deemed material, would render innumerable state court proceedings unworthy of the full faith and credit recognition mandated by 28 U.S.C. § 1738 and by *Allen v. McCurry*.

Finally, the court of appeals relied on the fact that at the 1984 hearing, the state court had, pursuant to Connecticut General Statutes § 54-46a(b), exercised its discretion to limit the accused "to cross examining the state's witnesses and submitting a written offer of proof identifying witnesses and evidence he wished to present." 950 F.2d at 870 (10a). And yet, in exercising this discretion, and in reaching its conclusion that the prosecution had met its burden, the state court, as required by state law, treated each of the factual assertions in respondent's written Offer of Proof as both admissible and as true (124 JA). *See State v. Conrod*, 198 Conn. 592, 597, 504 A.2d 494 (1986). Indeed, unlike the criminal

defendant who unsuccessfully challenges a search warrant under *Franks v. Delaware*, 438 U.S. 154 (1978), but fails to meet the threshold requirement entitling him even to an evidentiary hearing, respondent here was not only afforded an adversarial hearing, he was given "the benefit of the doubt" that each of his challenges to police conduct and police veracity claimed in his offer of proof was true. Moreover, this is not a case in which the previous state proceeding was conducted *ex parte*, *Bailey v. Andrews*, 811 F.2d 366, 370 (7th Cir. 1987), or where the accused chose not to "attack the veracity of the state's case." *Whitley v. Seibel*, 676 F.2d 245, 249 (7th Cir.), *cert. denied*, 459 U.S. 942 (1982).

By ignoring the actual effect of the state law of evidence in the previous state court hearing, the court below undermined the twin goals of collateral estoppel recognized in *Allen*: "reduc[ing] unnecessary litigation" and "promot[ing] the comity between state and federal courts. . ." 449 U.S. at 95-96.

This Court should now determine that, consistent with the rationale of *Allen v. McCurry*, the collateral estoppel defense is available when a Section 1983 claimant, although limited in the previous probable cause proceeding to cross examination and a written offer of proof, otherwise presents all challenges to police veracity and makes no claim of false prosecution testimony or any other irregularity under state law. Particularly because a clear legal standard would minimize or eliminate the possibility of the duplication, waste of judicial resources and added cost imposed on municipalities in re-litigating wrongful arrest and wrongful prosecution claims in Section 1983 actions, the decision below merits review.

II. THE DECISION BELOW ON COLLATERAL ESTOPPEL CREATES THE POTENTIAL FOR INCONSISTENT RESULTS IN SECTION 1983 ACTIONS

The decision below not only imposes unwarranted burdens on Section 1983 defendants raising a collateral estoppel defense, it also sets a standard for issue preclusion in *wrongful prosecution claims* that differs from the standard for issue preclusion adopted by other circuits in wrongful *search and seizure claims*. The Court of Appeals for the Tenth Circuit has held, in express reliance on *Allen v. McCurry*, that a state court's rejection of challenges to a search warrant is entitled to preclusive effect in a subsequent Section 1983 action even in the absence of any evidentiary hearing whatsoever. *Searing v. Hayes*, 684 F.2d 694, 697 (10th Cir. 1982). In *Searing*, the plaintiffs, like respondent here, argued that a previous state court determination of probable cause to support police action (procuring and executing a search warrant) should not be given preclusive effect in the Section 1983 action because they had "not received a full and fair opportunity in state court to litigate the legality of the search warrant." *Id.* at 697. In affirming the district court's grant of summary judgment for the defendant-police officer, the court rejected the plaintiffs' argument:

> The plaintiffs failed to meet the necessary threshold requirement of *Franks*. . . . [Their affidavits] failed to make the preliminary showing for the evidentiary hearing. Thus the plaintiffs received a full and fair opportunity to litigate the legality of the search warrant. Just because they did not meet the requirements under *Franks* to receive an evidentiary hearing does not limit the application of collateral estoppel.

Id.

Other courts applying *Allen v. McCurry* have reached the same result in Section 1983 actions raising fourth amendment claims. *See, e.g., Ayers v. Richmond*, 895

F.2d 1267, 1271-72 (9th Cir. 1990) (previous state court suppression rulings "fully and fairly litigated on the merits;" no indication whether prior hearing was evidentiary); *Sanders v. Frisby*, 736 F.2d 1230 (8th Cir. 1984) (per curiam) (previous state court suppression ruling preclusive; no indication whether prior hearing was evidentiary).

The decision below has thus created the anomalous result in Section 1983 actions that a previous state court determination of probable cause for a *search* is entitled to preclusive effect even in the absence of an evidentiary hearing, while a state court determination of probable cause for *arrest* is not entitled to preclusive effect even when made following an extensive adversarial hearing. Because the element of "probable cause" is more directly at issue in a Section 1983 claim for malicious prosecution than it is in a Section 1983 claim for wrongful search, and because the court below has created potential inconsistencies in the standards for issue preclusion in Section 1983 actions, the decision of the court of appeals in this case merits review.

III. THE DECISION BELOW REJECTING QUALIFIED IMMUNITY FOR PETITIONER POLICE OFFICERS ON RESPONDENT'S CLAIM OF MALICIOUS PROSECUTION UNDER 42 U.S.C. § 1983 PRESENTS IMPORTANT QUESTIONS REGARDING THE APPLICATION OF THIS COURT'S DECISION IN *MALLEY v. BRIGGS*, 485 U.S. 335 (1986)

A. This Court Should Establish That Under *Malley v. Briggs*, Officers May Rely In Good Faith On A State Court's Finding Of Probable Cause Following A Fair Adversarial Hearing

The court of appeals' refusal to give due weight to the previous state court finding of probable cause resulted not only in its erroneous rejection of petitioners' collateral estoppel defense, but also in its misapplication of the qualified immunity standard established by this Court in *Malley v. Briggs*, 475 U.S. 335.

In *Malley*, this Court held that where an affidavit in support of an arrest lacks probable cause, officers who prepared the affidavit are nonetheless qualifiedly immune to suit under 42 U.S.C. § 1983 unless "the warrant application is so lacking in probable cause as to render official belief in its existence unreasonable. . . ." *Id.* at 345. The Court explained:

> . . . Defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized.

Id. at 341.

That petitioners reasonably believed there was probable cause to prosecute respondent is firmly supported by the state court judge's finding of probable cause. This crucial fact was largely ignored by the court of appeals, which dismissed the significance of the state court judge's finding by concluding, without foundation in the record, that the state court judge had not been aware of the alleged falsehoods and omissions.[3]

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[3] The court of appeals concluded that petitioners withheld the following information which "might well have led the state court to rule that probable cause . . . was lacking": (1) eyewitness descriptions which did not fit respondent; (2) an eyewitness identification of another suspect; (3) evidence of bias on the part of respondent's former wife who testified at the hearing; (4) evidence that respondent's fingerprints did not match those suspected to belong to the killer; and (5) evidence that respondent's blood type did not match the type the killed was believed to have had. 950 F.2d at 872 (14a).

The court's conclusion is inconsistent with the record, which establishes that, to the extent that the above information was available, it was brought to the attention of the state court during the probable cause hearing. The eyewitness descriptions, identification of another suspect, and non-matching fingerprints were all pointed out to the state court in respondent's written Offer of Proof (442-45 JA). As to the blood type, that information was not withheld; it was unavailable. No one, including respondent, knew

The Court of Appeals for the Eighth Circuit, in an analogous case, held that a previous state court finding of probable cause was dispositive of the question of objective reasonableness. In *United States v. Martin*, 833 F.2d 752 (8th Cir. 1987) the court applied the objective good faith standard to a case where judges reviewing a search warrant affidavit disagreed about whether or not it had established probable cause. Evidence seized pursuant to a warrant issued by a state court judge was later suppressed in federal court by a magistrate who found the warrant was not supported by probable cause. *Id.* at 756. The district court endorsed the magistrate's decision, but the court of appeals reversed, holding that police officers acted in good faith in preparing and executing the search warrant. The appellate court reasoned that "[w]hen judges can look at the same affidavit and come to differing conclusions, a police officer's reliance on that affidavit must, therefore, be reasonable." *Id.* (*citing Malley*, 475 U.S. at 343; *United States v. Leon*, 468 U.S. 897 (1984)).

In this case, petitioners' reliance on the state court's post-hearing finding of probable cause was as objectively reasonable as the *Martin* officers' reliance on the state court's finding in that case that the affidavit sustained

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his true blood type until the completion of the court-ordered blood test on the eve of trial (43 JA).

Also available to the state court at the probable cause hearing was the claimed evidence of bias and inconsistent statements on the part of respondent's former wife. She was cross examined by respondent's counsel for two days on the same inconsistencies and bias claimed in this case (446-80, 493-96 JA).

It must be remembered that petitioners seek immunity not for respondent's false arrest claim, which was time-barred, 761 F. Supp. at 966 (23a), but for the claim that they maliciously caused the prosecution against respondent to be initiated and continued. Thus, the quality of the information presented to the judge who issued the arrest warrant is immaterial to the question of petitioners' good faith reliance on the ruling of the judge who found probable cause following arrest.

probable cause.[4] Because the question of what weight should be afforded a state court's post-hearing finding of probable cause in determining objective reasonableness under *Malley* is significant in wrongful arrest and wrongful prosecution claims under Section 1983, the decision below warrants review.

B. This Court Should Establish That Under *Malley v. Briggs*, Officers May Be Qualifiedly Immune Even When They Execute A Warrant Based On An Affidavit Which Omitted Material Information

In *Magnotti v. Kuntz*, 918 F.2d 364 (2d Cir. 1990) the court of appeals applied the *Malley* standard of objective reasonableness to a case in which the plaintiff claimed he was arrested on a warrant whose supporting affidavit excluded material information and included material falsehoods. The court held that police officers who prepared the affidavit were qualifiedly immune under *Malley* because the affidavit, after being corrected to exclude the material falsehoods and include the material omissions, still supported a reasonable official belief in the existence of probable cause. *Id.* at 868 (*citing*, *Malley*, 475 U.S. at 345).[5]

The *Magnotti* court was careful to distinguish between the questions of probable cause and qualified immunity, writing that "[e]vidence before the court might be in-

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[4] The affidavit in *Martin* was not alleged to contain falsehoods or exclude material information. *United States v. Martin*, 833 F.2d 752, 756 (8th Cir. 1987). While *Martin* is thus factually different from petitioners' case, the difference is of no moment if the affidavit prepared by petitioners is "corrected" to exclude the alleged falsehoods and include the alleged omissions. *See* discussion *infra*; *Magnotti*, 918 F.2d at 368. Moreover, both the state and federal judges in this case who reviewed the facts in support of probable cause also reviewed the allegedly false and omitted information.

[5] The court concluded that the defendants were qualifiedly immune despite the plaintiff's claims that the officers' "deliberate or reckless disregard for the truth established a retributive motive." *Magnotti v. Kuntz*, 918 F.2d 364, 368 (2d Cir. 1990).

sufficient to sustain . . . probable cause . . . , yet be adequate for the judge to conclude it was reasonable for [the defendant] to believe he had a good basis for his actions." *Magnotti*, 918 F.2d at 367. *See*, *Myers v. Morris*, 810 F.2d 1437, 1455 (1st Cir. 1987) (officers qualifiedly immune for seeking arrest warrant, making sworn criminal complaint and effecting arrest where existence of probable cause was at least *arguable*); *cf. Robison v. Via*, 821 F.2d 913, 921 (2d Cir. 1987) (where probable cause *arguably* existed, officers qualifiedly immune to suit for warrantless arrest).

In cases decided both before and after the one presented here, the United States District Court for the District of Connecticut and the Court of Appeals for the Second Circuit applied the above standards to hold that officers were qualifiedly immune where an analysis of a "corrected" version of the challenged warrant affidavits supported a reasonable official belief in probable cause. *See*, *Mozzochi v. Borden*, No. 91-7634, 1992 WL 52601 (2d Cir. March 19, 1992) (reversing denial of summary judgment); *Greco v. Howard*, Civ. No. N-85-252 (D. Conn. April 24, 1989) (granting summary judgment) (copy appended to this Petition at 42a).

Nonetheless, in this case the court of appeals rejected petitioners' qualified immunity defense and, in so doing, ignored the standards established in *Malley* and *Magnotti*. The court wrote:

> . . . Appellants contend that they are entitled to immunity as a matter of law because it would have been objectively reasonable for them to believe that if the warrant affidavit were corrected to disclose all of the omitted information and to eliminate all of the misrepresentations, *the affidavit as corrected would show probable cause* to arrest and prosecute Golino. This contention, which assumes that the omissions and misrepresentations were not material, hardly

> views the facts in the light most favorable to Golino as is required on a motion for summary judgment.

950 F.2d at 871 (13a) (emphasis added).

The court's characterization of petitioners' argument is incorrect. Petitioners do not claim that a corrected version of the affidavit would sustain probable cause, but rather that even if probable cause is lacking, the corrected affidavit is still sufficient to sustain a *reasonable belief* that probable cause existed. *Malley*, 475 U.S. at 345; *Magnotti*, 918 F.2d at 368. This argument views respondent's claims in the light most favorable to him: it assumes that the defects claimed by respondent were material, and that the affidavit should be corrected.

The court of appeals compounded its error by concluding that petitioners could not be immune because they withheld and/or misrepresented information which "was not immaterial to th[e] question [of probable cause] as a matter of law." 950 F.2d at 872 (14a). This conclusion again ignores *Malley* and *Magnotti*, under which petitioners are qualifiedly immune even if the affidavit contains material falsehoods and omissions, so long as a "corrected" version of the affidavit would sustain a reasonable officer's belief in the existence of probable cause.

A proper application of *Malley* and *Magnotti* requires that petitioners be held qualifiedly immune as a matter of law: a careful review of a "corrected" version of the arrest warrant affidavit, which includes the information respondent claims was wrongly omitted and excludes the information respondent claims was false, supports a reasonable official belief in the existence of probable cause.[6] Accordingly, the decision below warrants review.

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[6] This "corrected" affidavit was appended to the Reply Brief of Defendants-Appellants filed in the court of appeals on September 4, 1991.

C. This Court Should Endorse The Totality Of Circumstances Test For Objective Reasonableness Established By The Federal Circuit Courts

A number of federal circuit courts have established that qualified immunity under *Malley* is determined by reviewing not only the four corners of a challenged affidavit and warrant, but also all the circumstances surrounding the allegedly illegal arrest. *E.g.*, *Myers*, supra, 810 F.2d at 1455, 1457 (defendants qualifiedly immune where, in light of "facts and circumstances before the deputies," "their conduct in seeking and performing the arrests was objectively reasonable."); *Martin*, supra, 833 F.2d at 756 (arrest valid where totality of circumstances, including information known to officer but not included in warrant affidavit, established officer's objective good faith). *Cf. Robison supra*, 821 F.2d at 922 (defendants qualifiedly immune to liability under 42 U.S.C. § 1983 where warrantless arrest was objectively reasonable under all surrounding circumstances).

In this case, the circumstances surrounding the arrest and prosecution of respondent include the following *undisputed* facts: (a) petitioners prepared the affidavit at the direction of and in consultation with prosecutors, who had been kept apprised of the investigation (133 JA); (b) a superior court judge found probable cause to prosecute respondent following a nine day evidentiary hearing at which the accused's counsel cross examined witnesses at length; and (c) with respect to the respondent's claim that petitioners withheld exculpatory information regarding his true blood type, respondent himself told petitioners his blood type was "O", the type the killer was believed to have had; petitioners tried, albeit unsucessfully, to confirm that information at local hospitals; and petitioners twice asked the prosecutor to obtain the plaintiff's blood type prior to his arrest, but she declined for strategic reasons (338-39, 90-96, 68-71 JA). *See Holdeman v. Consolidated Rail Corp.*, 649 F. Supp. 1188, 1199 (N.D. Ind. 1986) (where officers consulted with prosecu-

tor before arresting plaintiff and prosecutor determined they had probable cause, "no one can fault them for exercising that type of judgment."), *aff'd mem.*, 840 F.2d 20 (7th Cir. 1988). Obviously, without the approval of the prosecutor in charge of the case, petitioners were in no position to obtain the necessary warrant to compel respondent to submit to a blood test. Indeed, when the prosecutor finally did seek a court order for a blood test, respondent resisted it (42 JA).

The court of appeals' decision ignored these undisputed facts and failed to apply the appropriate totality of the circumstances test to determine objective reasonableness. Petitioners urge this Court to grant review in this case, and endorse the totality of the circumstances test for determining objective reasonableness under *Malley*.

CONCLUSION

For all the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 7, 1992

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 352, Docket 91-7600

ANTHONY GOLINO,
Plaintiff-Appellee,

v.

CITY OF NEW HAVEN, WILLIAM FARRELL, ROBERT LILLIS, ANTHONY DILULLO, LEONARD PASTORE, MARY FISH-MACDONALD, JOYCE CARASONE LUPONE, JOHN and/or MARY DOE ONE THROUGH JOHN and/or MARY DOE TEN, BEING OFFICERS, AGENTS OR EMPLOYEES OF THE CITY OF NEW HAVEN, THE STATE OF CONNECTICUT OR THOSE ACTING IN CONCERT WITH THEM, WHOSE NAMES ARE PRESENTLY UNKNOWN TO THE PLAINTIFF,
Defendants,

ROBERT LILLIS, LEONARD PASTORE, ANTHONY DILULLO, MARY FISH-MACDONALD,
Defendants-Appellants.

Argued Oct. 18, 1991

Decided Dec. 3, 1991

Steven Traub, New Haven, Conn. (Hugh F. Keefe, Lynch, Traub, Keefe & Errante, on the brief), for plaintiff-appellee.

William C. Longa, Bridegport, Conn. (David P. Atkins, Shelley R. Sadin, Zeldes, Needle & Cooper, Bridgeport,

Conn., Martin S. Echter, Deputy Corp. Counsel, City of New Haven, New Haven, Conn., on the brief), for defendants-appellants.

Before KAUFMAN, KEARSE and McLAUGHLIN, Circuit Judges.

KEARSE, Circuit Judge:

Defendants Robert Lillis, Leonard Pastore, Anthony DiLullo, and Mary Fish-MacDonald appeal from so much of an order of the United States District Court for the District of Connecticut, José A. Cabranes, *Judge*, as denied their motion for summary judgment dismissing claims against them by plaintiff Anthony Golino under 42 U.S.C. § 1988 (1988) for malicious prosecution. Appellants moved for summary judgment on the grounds that (1) a state-court finding during the prior criminal proceeding collaterally estops Golino from litigating in the present case the issue of whether there was probable cause to prosecute him, and (2) as police officers, they enjoy qualified immunity from the present suit. The district court denied appellants' motion on the grounds that (1) collateral estoppel was inappropriate because Golino had not had a sufficient opportunity in the prior proceedings to litigate the probable cause question, and (2) there were genuine issues of material fact to be tried with respect to the immunity defense. On appeal, appellants contend that the district court erred in concluding (1) that Golino did not have an adequate opportunity to litigate the question of probable cause, and (2) that any existing questions of fact with respect to probable cause are material. For the reasons below, we reject both contentions and affirm the order of the district court.

I. BACKGROUND

The present action arises out of an 11-year investigation by the City of New Haven Police Department into the 1973 murder of Concetta ("Penny") Serra. Lillis, a police sergeant, supervised the investigation. DiLullo

and Pastore, police detectives, and Fish-MacDonald, a police officer, had primary operational responsibility for the investigation. In July 1984, Golino was arrested pursuant to an arrest warrant and charged with the murder.

In August 1984, following a preliminary evidentiary hearing held pursuant to state law ("1984 state hearing"), Connecticut Superior Court Judge Frank Kinney found probable cause to support the murder charge. At that hearing, Judge Kinney permitted Golino's counsel to cross-examine the state's witnesses and to make a brief written offer of proof, but he denied Golino's request to introduce evidence. In May 1987, just prior to the scheduled start of Golino's trial for murder, a court-ordered blood test revealed that Golino's blood type did not match that of the killer. The charges against Golino were then dismissed.

In January 1988, Golino commenced the present action against appellants and several other defendants. To the extent pertinent here, he asserted claims against appellants under § 1983 for malicious prosecution. After a period of discovery, appellants moved for summary judgment dismissing these claims on the grounds that (1) as police officers, they were entitled to qualified immunity because there existed no genuine issue of fact as to the existence of probable cause to arrest and try Golino, or (2) Judge Kinney's probable cause determination precluded Golino from relitigating that issue in the present case.

In a ruling reported at 761 F. Supp. 962 (1991), the district court denied this motion, stating that "the record as it currently stands contains evidence from which a reasonable jury might infer that plaintiff was maliciously prosecuted." *Id.* at 964. The court noted that in order to establish a § 1983 claim for malicious prosecution, a plaintiff must show, *inter alia*, that the prosecution was without probable cause. *See Conway v. Village of Mount Kisco*, 750 F.2d 205, 214 (2d Cir.1984) (state

law defines elements of a malicious prosecution claim asserted under § 1983, *see* 42 U.S.C. § 1988 (1988)); *McGann v. Allen*, 105 Conn. 177, 185, 134 A. 810, 813 (1926) (absence of probable cause is one element of malicious prosecution claim under Connecticut law). As to appellants' defense of issue preclusion, the court found that the authorities cited for the proposition that a state-court probable cause hearing generally has collateral estoppel effect did not establish that proposition. In addition, noting that it was undisputed that Golino had not been permitted to present evidence at the 1984 state hearing, the court concluded that he had not been given an adequate opportunity at that hearing to contest probable cause. Thus, the court cconluded that litigation here of the issue of probable cause was not foreclosed by principles of collateral estoppel.

As to the merits of the probable cause question, the court concluded that there existed genuine issues of material fact because the affidavit leading to the warrant for Golino's arrest and to his subsequent prosecution, contained false statements and made numerous material omissions. To begin with, Golino was connected to the Serra murder principally by statements that the police attributed to his former wife, Joyce Carasone Lupone (from whom he had separated in 1980, and who testified at the 1984 state hearing that she hated Golino and would do anything she could to keep him from getting custody of their son), whom the police knew to be involved in acrimonious divorce proceedings with Golino. The warrant affidavit quoted Lupone as stating that on more than one occasion Golino had made incriminating remarks to her, *i.e.*, threatening to do to her "the same . . . as he had done to Penny Serra." The affidavit did not disclose, however, that Lupone had also made statements to the police that were inconsistent with the statements it attributed to her, and it omitted mention of the fact that at one time Lupone told the police that Golino never made the quoted statements. The affidavit also

stated that an informant, Neil Russo, told police that Golino had dated Serra. The district court noted the probable falsity of this statement in light of Russo's deposition testimony in the present case that he had never made this statement to the police and that when they interviewed him, he would "say one thing and they put down another thing."

The court also noted that a number of other evidently pertinent facts had been omitted from the arrest warrant affidavit. For example, the affidavit described the killer only as "a white male wearing a light colored shirt and dark trousers, carrying a shiney [*sic*] object in his hand," notwithstanding the fact that several eyewitnesses had given descriptions in considerably greater detail. Thus, one eyewitness described the killer as "approximately 5′8″ tall, 150 to 160 pounds [with a] slim build"; another stated that he had a "thin face" and "skinny arms"; a third eyewitness also described the killer as having a "thin face." The significance of these omissions was that Golino, at the time of Serra's death, weighed approximately 215 pounds. All three of these eyewitnesses also stated that the killer had no mustache. Golino, at the time, had a mustache. A fourth eyewitness had described the killer as having a mustache; but that eyewitness had, within hours of the murder, affirmatively identified another person, from both a photo array and a lineup, as the killer, and the person identified was Serra's boyfriend. Further, the affidavit did not mention that the killer's blood type was known but that the police had not bothered to seek a court order for a test to determine Golino's blood type. It also failed to mention that fingerprints on Serra's car that the police strongly believed to belong to her killer did not match the fingerprints of Golino. DiLullo testified at his deposition in the present case that it was his general practice to omit exculpatory information from affidavits submitted in support of applications for warrants.

The district court concluded that it could not rule as a matter of law that it was " 'objectively reasonable for [appellants] to believe that they were acting in a fashion that did not violate [Golino's] established federally protected right[s].' " 761 F.Supp. at 971-72 (quoting *Hurlman v. Rice*, 927 F.2d 74, 79 (2d Cir.1991)). Accordingly, an order was entered denying so much of appellants' motion as sought dismissal of the malicious prosecution claims. This appeal followed.

II. DISCUSSION

On appeal, appellants pursue their contentions that they were entitled to summary judgment dismissing the malicious prosecution claims on grounds of collateral estoppel and qualified immunity. For the reasons below, we conclude that the district court properly denied appellants' motion. We note first, however, a question as to appellate jurisdiction.

A. *Appellate Jurisdiction*

The denial of summary judgment is ordinarily not an appealable "final decision" within the meaning of 28 U.S.C. § 1291 (1988). A district court's denial of a summary judgment motion that is based upon a substantial claim of qualified immunity, however, is immediately appealable where the district court has rejected the defense as a matter of law. *See, e.g., Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S.Ct. 2806, 2817, 86 L.Ed.2d 411 (1985); *Magnotti v. Kuntz*, 918 F.2d 364, 367 (2d Cir. 1990). Where the district court has ruled that adjudication of the immunity defense requires resolution of genuinely disputed questions of material fact, the denial of summary judgment is not immediately appealable. *See, e.g., Mitchell v. Forsyth*, 472 U.S. at 530, 105 S.Ct. at 2817; *Kaminsky v. Rosenblum*, 929 F.2d 922, 926 (2d Cir. 1991); *Hurlman v. Rice*, 927 F.2d at 79; *Langley v. Coughlin*, 888 F.2d 252, 254 (2d Cir.1989). Thus, we

have jurisdiction to review appellants' immunity defense only to the extent that it can be decided as a matter of law. These principles have significance here in two respects.

Leaving aside for the moment appellants' claim of collateral estoppel, the district court ruled that the merits of appellants' claim of qualified immunity could not be decided on summary judgment because there were material issues of facts to be determined with respect to (a) whether there was probable cause, and (b) whether it was objectively reasonable for appellants to believe they had probable cause. Since the court ruled that the resolution of these probable cause issues involved questions of fact, the ruling is not, in principle, immediately appealable.

In contrast, there are no questions of fact to be determined with respect to the collateral estoppel argument. There is no dispute as to what occurred at the state-court hearing, or as to what questions were before the court, or as to what issues were necessarily decided. Thus, the district court's ruling that, in light of the undisputed facts, there is no collateral estoppel is a ruling on a question of law. This ruling has twofold significance to appellants' qualified immunity defense, for if appellants had probable cause to arrest and prosecute Golino, (a) there would have been no violation of his constitutional rights, *see Siegert v. Gilley*, —— U.S. ——, 111 S.Ct. 1789, 1798, 114 L.Ed.2d 277 (1991) (defendant entitled to qualified immunity where, as a matter of law, plaintiff cannot prove a constitutional violation), and (b) it would have been objectively reasonable for them to believe that those actions did not violate his constitutional rights. Accordingly, since the rejection of the collateral estoppel argument was a purely legal ruling and affects whether qualified immunity is available as a matter of law, we have jurisdiction to review the denial of summary judgment on the collateral estoppel ground.

As noted above, the court's ruling that the merits of the probable cause issue turn on questions of fact was not, in and of itself, appealable. However, where we have jurisdiction to consider some questions on appeal, we may exercise our discretion to take pendent jurisdiction over related questions. *See, e.g., San Filippo v. United States Trust Co. of New York*, 737 F.2d 246, 255 (2d Cir.1984) ("once we have taken jurisdiction over one issue in a case, we may, in our discretion, consider otherwise nonappealable issues in the case as well, where '[t]here is sufficient overlap in the factors relevant to [the appealable and nonappealable] issues to warrant our exercising plenary authority over [the] appeal' ") (quoting *Sanders v. Levy*, 558 F.2d 636, 643 (2d Cir.1976), *rev'd on other grounds sub nom. Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 98 S.Ct. 2380, 57 L.Ed.2d 253 (1978)); *cert. denied*, 470 U.S. 1035, 105 S.Ct. 1408, 84 L.Ed.2d 797 (1985). Given the close relationship between the collateral estoppel issue, *i.e.*, whether Golino had an adequate opportunity to contest the existence of probable cause, and the merits of the probable cause issues, we will exercise our discretion in this case to review the district court's ruling that there exist material questions of fact as to the existence of probable cause and the objective reasonableness of any belief on the part of appellants that there existed probable cause.

B. *The Collateral Estoppel Argument*

Pursuant to 28 U.S.C. § 1738 (1988), the federal courts "must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 81, 104 S.Ct. 892, 896, 79 L.Ed.2d 56 (1984). This rule applies to determine the preclusive effect of a state court judgment on a subsequent suit in federal court brought pursuant to § 1983. *See Allen v. McCurry*, 449

U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980); *Temple of the Lost Sheep, Inc. v. Abrams*, 930 F.2d 178, 183 (2d Cir.), *cert. denied*, —— U.S. ——, 112 S.Ct. 193, 116 L.Ed.2d 153 (1991). Nonetheless, "[c]ollateral estoppel does not apply where the party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court." *Allen v. McCurry*, 449 U.S. at 101, 101 S.Ct. at 418.

Under Connecticut law, " '[f]or an issue to be subject to collateral estoppel, [1] it must have been fully and fairly litigated in the first action. [2] It also must have been actually decided and [3] the decision must have been necessary to the judgment.' " *Aetna Casualty and Surety Co. v. Jones*, 220 Conn. 285, 296, 596 A.2d 414, 421 (1991) (quoting *Virgo v. Lyons*, 209 Conn. 497, 501, 551 A.2d 1243, 1245 (1988)); *P.X. Restaurant, Inc. v. Town of Windsor*, 189 Conn. 153, 454 A.2d 1258, 1262 (1983). As to the first condition, the only one of the three at issue here, the Connecticut Supreme Court has explained that "[t]he requirement of full and fair litigation ensures fairness, which is a 'crowning consideration' in collateral estoppel cases." *Aetna Casualty and Surety Co. v. Jones*, 220 Conn. at 306, 596 A.2d at 425. Thus, "if the nature of the hearing carries procedural limitations that would not be present at a later hearing, the party might not have a full and fair opportunity to litigate." *Id.* at 306, 596 A.2d at 426; *see also Bailey v. Andrews*, 811 F.2d 366; 370 (7th Cir.1987) (finding of probable cause in state-court hearing, at which suspect was not allowed to present evidence or cross-examine witnesses, not given preclusive effect in subsequent § 1983 suit); *Coogan v. City of Wixom*, 820 F.2d 170, 175 (6th Cir.1987) (state-court finding of probable cause given preclusive effect in subsequent § 1983 suit because prior proceeding, at which suspect had a right to call witnesses and cross-examine witnesses, afforded him a full and fair opportunity to litigate the issue of probable cause).

We think the district court was correct in its assessment that, for collateral estoppel purposes, the 1984 state hearing entailed procedural limitations that curtailed Golino's efforts to secure the full and fair litigation of the probable cause issue. The purpose of such a hearing is generally the evaluation of the "sufficiency" of the evidence to constitute probable cause, not the "integrity" of the evidence. *See, e.g., Schertz v. Waupaca County*, 875 F.2d 578, 581 (7th Cir.1989); *Bailey v. Andrews*, 811 F.2d at 369-70. Thus, at such a hearing under Connecticut law, the suspect apparently has no right to call any witnesses or to introduce any evidence of his own. Nor did the state court exercise discretion to permit Golino to call witnesses or offer evidence. Rather, he was limited to cross-examining the state's witnesses and submitting a written offer of proof identifying witnesses and evidence he wished to present. Further, in connection with the preliminary hearing, Golino had no access to the police investigative file. As has transpired in the present action, that file contained numerous items of evidence that could have been used to cross-examine the police officers who testified and to create substantial questions about the existence of probable cause to prosecute Golino.

Given (a) the substantial showing in the present case that appellants' presentations in support of probable cause contained numerous significant misstatements and omissions, and (b) the limitations on Golino's ability to present his own evidence and to gain access to undisclosed significant facts known to the police in order to cross-examine the state's witnesses, we conclude that the 1984 state hearing did not provide Golino a full and fair opportunity, for collateral estoppel purposes, to litigate the issue of probable cause. Accordingly, the district court properly ruled that the probable cause decision of Judge Kinney should not be given preclusive effect.

C. *The Merits of the Qualified Immunity Defense*

The qualified or "good faith" immunity enjoyed by police officers shields them from personal liability for damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known," *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed. 2d 396 (1982); *see also Hurlman v. Rice*, 927 F.2d at 78; *Robison v. Via*, 821 F.2d 913, 920 (2d Cir.1987), or insofar as it was objectively reasonable for them to believe that their acts did not violate those rights, *see Anderson v. Creighton*, 483 U.S. 635, 638, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987); *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271 (1986); *Hurlman v. Rice*, 927 F.2d at 78; *Calamia v. City of New York*, 879 F.2d 1025, 1035 (2d Cir.1989). The right not to be arrested or prosecuted without probable cause has, of course, long been a clearly established constitutional right. Probable cause to arrest exists when the authorities have knowledge or reasonably trustworthy information sufficient to warrant a person of reasonable caution in the belief that an offense has been committed by the person to be arrested. *Dunaway v. New York*, 442 U.S. 200, 208 n. 9, 99 S.Ct. 2248, 2254 n. 9, 60 L.Ed.2d 824 (1979). An arresting officer is entitled to qualified immunity from a suit for damages on a claim for arrest without probable cause if either (a) it was objectively reasonable for the officer to believe that probable cause existed, or (b) officers of reasonable competence could disagree on whether the probable cause test was met. *See Maley v. Briggs*, 475 U.S. at 341, 106 S.Ct. at 1096; *Robison v. Via*, 821 F.2d at 921. In order to be entitled to summary judgment on such a defense, the officer must adduce sufficient facts that no reasonable jury, looking at the evidence in the light most favorable to, and drawing all inferences most favorable to, the plaintiff, could conclude that it was objectively unreasonable for the officer to believe that probable cause did not exist. *See id.*

Normally, the issuance of a warrant by a neutral magistrate, which depends on a finding of probable cause, creates a presumption that it was objectively reasonable for the officers to believe that there was probable cause, *see United States v. Ventresca*, 380 U.S. 102, 109, 85 S.Ct. 741, 746, 13 L.Ed.2d 684 (1965), and a plaintiff who argues that a warrant was issued on less than probable cause faces a heavy burden, *see, e.g., Rivera v. United States*, 928 F.2d 592, 602 (2d Cir.1991) (search warrant). In order to mount such a challenge, the plaintiff must make a "substantial preliminary showing" that the affiant knowingly and intentionally, or with reckless disregard for the truth, made a false statement in his affidavit and that the allegedly false statement was "necessary to the finding of probable cause." *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S.Ct. 2674, 2676, 57 L.Ed.2d 667 (1978); *see Magnotti v. Kuntz*, 918 F.2d at 368 (*Franks* standard, established with respect to suppression hearings in criminal proceedings, also defines scope of qualified immunity in civil rights actions). Intentional or reckless omissions of material information, like false statements, may serve as the basis for a *Franks* challenge, *see United States v. Campino*, 890 F.2d 588, 592 (2d Cir. 1989), *cert. denied*, 494 U.S. 1068, 110 S.Ct. 1787, 108 L.Ed.2d 788 (1990), and recklessness may be inferred where the omitted information was critical to the probable cause determination, *see Rivera v. United States*, 928 F.2d at 604; *DeLoach v. Bevers*, 922 F.2d 618, 622 (10th Cir.1990), *cert. denied*, —— U.S. ——, 112 S.Ct. 65, 116 L.Ed.2d 41 (1991); *Hale v. Fish*, 899 F.2d 390, 400 (5th Cir.1990); *United States v. Reivich*, 793 F.2d 957, 961 (8th Cir.1986). Where an officer knows, or has reason to know, that he has materially misled a magistrate on the basis for a finding of probable cause, as where a material omission is intended to enhance the contents of the affidavit as support for a conclusion of probable cause, *see generally, Rivera v. United States*, 928 F.2d 605; *United States v. Strini*, 658

F.2d 593, 597 (8th Cir.1981), the shield of qualified immunity is lost, *see Malley v. Briggs*, 475 U.S. at 344-45, 106 S.Ct. at 1097-98 (adopting standard set in *United States v. Leon*, 468 U.S. 897, 923, 104 S.Ct. 3405, 3420, 82 L.Ed.2d 677 (1984), as proper standard for objective reasonableness for qualified immunity purposes). An officer can "have no reasonable grounds for believing that [a] warrant was properly issued" "[i]f the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth," *United States v. Leon*, 468 U.S. at 923, 104 S.Ct. at 3421.

Whether an item of information is material or not is, in the context of a motion for summary judgment, a mixed question of law and fact. *See, e.g., TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 450, 96 S.Ct. 2126, 2132, 48 L.Ed.2d 757 (1976). The legal component depends on whether the information is relevant to a given question in light of the controlling substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The factual component requires an inference as to whether the information would likely be given weight by a person considering that question. *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. at 450, 96 S.Ct. at 2132.

The district court properly applied these principles in the present case to deny appellants' motion for summary judgment. Appellants contend that they are entitled to immunity as a matter of law because it would have been objectively reasonable for them to believe that if the warrant affidavit were corrected to disclose all of the omitted information and to eliminate all of the misrepresentations, the affidavit as corrected would show probable cause to arrest and prosecute Golino. This contention, which assumes that the omissions and misrepresentations were not material, hardly views the facts in the

light most favorable to Golino as is required on a motion for summary judgment. Viewed in the light most favorable to Golino, the record indicates that appellants deliberately withheld, *inter alia* the information that most of the eyewitnesses described the killer as thin, whereas Golino at the time weighed 215 pounds; that most of them described the killer as being clean shaven, whereas Golino at the time had a mustache; that the one eyewitness who said the killer had a mustache immediately positively identified a person other than Golino as the killer, and the man identified turned out to be Serra's boyfriend; that Golino's prime accuser, his former wife (whose extreme bias against Golino was confirmed at the 1984 state hearing), had made statements both inconsistent with those quoted in support of the warrant and recanting those quoted in support of the warrant; that the police had fingerprints which they strongly believed to have been left by the killer but which did not match the prints of Golino; and that the police knew the blood type of the killer but had declined to test Golino for blood type.

Plainly the information that was misrepresented or remained undisclosed in appellants' presentations in support of probable cause were not immaterial to that question as a matter of law. Such matters as descriptions of the killer that did not fit Golino, an eyewitness's identification of another plausible suspect as the culprit, the non-matching of fingerprints and blood types, are entirely relevant to the question of whether a person of reasonable caution would believe the murder had been committed by Golino. Possession of the undisclosed information at the 1984 state hearing might well have led the state court to rule that probable cause to prosecute Golino was lacking or at least to postpone any ruling on probable cause until after Golino had been tested for blood type. The latter course plainly would have led to a finding of no probable cause. The weight that a neutral magistrate would likely have given the above information, along with the other information that was con-

cealed or misrepresented, is not a legal question but rather is a question to be resolved by the finder of fact.

Given, in addition, the evidence that appellants' non-disclosure of the exculpatory information was deliberate, the district court properly concluded it could not rule as a matter of law that it was objectively reasonable for appellants to believe there was probable cause for the arrest and prosecution of Golino. Summary judgment was properly denied.

CONCLUSION

We have considered all of appellants' challenges to the decision of the district court and have found them to be without merit. The order denying summary judgment is affirmed.

UNITED STATES DISTRICT COURT
D. CONNECTICUT

Civ. No. N-88-2 (JAC)

ANTHONY GOLINO
v.

CITY OF NEW HAVEN, WILLIAM FARRELL, ROBERT LILLIS, ANTHONY DILULLO, LEONARD PASTORE, MARY FISH-MACDONALD, JOYCE CARASONE LUPONE, JOHN and/or MARY DOE ONE THROUGH JOHN and/or MARY DOE TEN BEING OFFICERS, AGENTS OR EMPLOYEES OF THE CITY OF NEW HAVEN, THE STATE OF CONNECTICUT OR THOSE ACTING IN CONCERT WITH THEM, WHOSE NAMES ARE PRESENTLY UNKNOWN TO THE PLAINTIFF

April 18, 1991

Donn A. Swift, Lynch, Traub, Keefe and Errante, New Haven, Conn., for plaintiff.

William Longa, Shelley Sadin, Zeldes, Needle & Cooper, Bridgeport, Conn., for defendants.

RULING ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

JOSÉ A. CABRANES, District Judge:

Plaintiff Anthony Golino has brought this action under 42 U.S.C. § 1983 ("section 1983"), seeking money damages for alleged violations of his constitutional rights. These claims arise from an eleven-year investigation of

the murder of Concetta "Penny" Serra, who was killed in New Haven in 1973. The investigation led eventually to the arrest of plaintiff on July 3, 1984, pursuant to a warrant issued that day on a charge of murder.

On August 28, 1984, Superior Court Judge Frank Kinney found probable cause for the murder charge. The prosecution progressed until May 15, 1987 when on the eve of trial, the court ordered a blood test which revealed that plaintiff's blood type did not match that of the killer. The charges against plaintiff were dismissed immediately thereafter. The dismissal of these charges, and the circumstances under which they were dismissed, have made the Serra homicide and its investigation the focus of local and national press attention.

Plaintiff alleges numerous violations of his civil rights and makes claims against the following named defendants: The City of New Haven; William Farrell, the Chief of Police of the City of New Haven at all times relevant to plaintiff's claims; Robert Lillis, a sergeant for the New Haven Police Department who supervised the Serra homicide investigation; Leonard Pastore, a detective for the New Haven Police Department who participated in the investigation; Anthony DiLullo, a detective for the New Haven Police Department who participated in the investigation; Mary Fish-MacDonald, an officer of the New Haven Police Department who participated in the investigation; and Joyce Carasone Lupone, the former wife of the plaintiff Anthony Golino, who is alleged to have conspired with the defendants named above. According to the Complaint—and there is apparently no dispute about this—the defendants DiLullo, Pastore and Fish-MacDonald "bore the personal and primary operational responsibility for the investigation." Complaint (filed Jan. 5, 1988), ¶ 13. Plaintiff identifies his four causes of action as (1) conspiracy, (2) arrest with excessive force, (3) malicious prosecution, and (4) supervisory and municipal liability. Default was entered against de-

fendant Lupone on May 23, 1988, and plaintiff's unopposed motion for judgment of default as to defendant Joyce Carasone Lupone (filed June 7, 1988) has not been acted upon, pending consideration of dispositive motions as to the other defendants.

Defendants moved for summary judgment, and the court heard oral argument on the motion on March 14, 1991.

For the reasons stated below, defendants' motion for summary judgment is granted with respect to plaintiff's excessive force and conspiracy claims (against defendants Lillis, DiLullo, Pastore, Fish-MacDonald, and John and/or Mary Doe One through Ten), inasmuch as those claims are time-barred by the applicable statute of limitations. Defendants' motion for summary judgment is also granted with respect to plaintiff's claims of supervisory and municipal liability (against defendants Farrell and City of New Haven), because plaintiff has not produced sufficient evidence to sustain all elements of those claims. However, with respect to plaintiff's claim of malicious prosecution (against defendants Lillis, DiLullo, Pastore, Fish-MacDonald and John and/or Mary Doe One through Ten), defendants' motion for summary judgment is denied because the record as it currently stands contains evidence from which a reasonable jury might infer that plaintiff was maliciously prosecuted. In denying defendants' motion with respect to the claim of malicious prosecution, the court intimates no view on the merits of this single remaining claim. It merely leaves this matter open for trial by jury.

DISCUSSION

A.

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). "[T]he mere existence of *some* allegedly factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986) (emphasis in original). While the court must view the inferences to be drawn from the facts in the light most favorable to the party opposing the motion, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986), a party may not "rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment." *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 12 (2d Cir.1986), *cert. denied*, 480 U.S. 932, 107 S.Ct. 1570, 94 L.Ed.2d 762 (1987). The nonmoving party may defeat the summary judgment motion by producing sufficient specific facts to establish that there is a genuine issue of material fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Finally, " 'mere conclusory allegations or denials' " in legal memoranda or oral argument are not evidence and cannot by themselves create a genuine issue of material fact where none would otherwise exist. *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir.1980) (quoting *SEC v. Research Automation Corp.*, 585 F.2d 31, 33 (2d Cir.1978)).

B.

There is no dispute among the parties that the limitations period governing this action is the three-year period allowed under Con.Gen.Stat. § 52-577. And there is no dispute that plaintiff's claim of malicious prosecution (Count One) is not barred by that limitations period. *See* Memorandum of Law in Support of Defendants' Motion for Summary Judgment (filed Aug. 10, 1990) ("Defend-

ants' Memorandum") at 32. Defendants argue, however, that plaintiff's excessive force claim (against defendants Lillis, DiLullo, Pastore, Fish-MacDonald, and John and/or Mary Doe One through Ten) (Count One) and his conspiracy claim (against defendants Lillis, DiLullo, Pastore, Fish-MacDonald, Lupone, and John and/or Mary Doe One through Ten) (Count Two) accrued, at the latest, at the time of the July 1984 arrest, more than three years prior to the commencement of this action on January 5, 1988, and that, therefore, those claims are time-barred. I agree.

Federal law, which governs the date of accrual of federal claims such as those asserted here, *see Kaiser v. Cahn*, 510 F.2d 282, 285 (2d Cir.1974), "establishes as the time of accrual that point in time when the plaintiff knows or has reason to know of the injury which is the basis of his action." *Singleton v. City of New York*, 632 F.2d 185, 191 (2d Cir.1980), *cert. denied*, 450 U.S. 920, 101 S.Ct. 1368, 67 L.Ed.2d 347 (1981). And as our Court of Appeals has made clear, even the existence of a conspiracy does not postpone the accrual of causes of action arising out of the conspirators' separate wrongs. "It is the act, not the conspiracy, which is actionable. . . ." *Id.* at 192.

However, on the ground that "the length of the limitations period, and closely related questions of tolling and application, are to be governed by state law," *Wilson v. Garcia*, 471 U.S. 261, 269, 105 S.Ct. 1938, 1943, 85 L.Ed.2d 254 (1985), plaintiff contends that *Singleton* is not controlling inasmuch as *Singleton*, a New York case, did not address the Connecticut "continuing wrong" exception to its statute of limitations. Plaintiff's Memorandum of Law in Opposition to the Defendants' Motion for Summary Judgment (filed Oct. 22, 1990) ("Plaintiff's Response") at 33-34. According to plaintiff, the alleged conspiracy and excessive force about which he complains amounted to a "continuing wrong," and the applicable

three-year statute of limitations should therefore have been tolled until the conclusion of the continuing wrong (which plaintiff believes was May 15, 1987, the date when charges in the state criminal case were dismissed).

In support of his argument, plaintiff cites only *Mitchell v. City of Hartford*, 674 F.Supp. 60, 63 n. 3 (D.Conn.1986), a case in which Judge Blumenfeld discussed the concept of a "continuing wrong" but which provides little, if any, support for plaintiff's conclusion. Judge Blumenfeld held in that case that the plaintiff's section 1983 conspiracy claim did *not* constitute a "continuing wrong." *See id.; cf. Singleton*, 632 F.2d at 192-93 (noting that a New York law—substantially similar to the Connecticut law for "continuing wrongs"—that postpones the accrual of certain causes of action did not apply to plaintiff's section 1983 claims). And, as Judge Blumenfeld explained, the "continuing wrong" exceptions "have generally been applied to correct inequitable situations that occur when the plaintiff's cause of action would otherwise be barred before he discovers the injury." *Mitchell*, 674 F.Supp. at 63 n. 3. Plaintiff in the instant case has not offered the sort of evidence that might suggest that such an "inequitable situation" occurred: There is no evidence that the three-year statute ran before he sustained the injuries, *see, e.g., Handler v. Remington Arms Co.*, 144 Conn. 316, 130 A.2d 793 (1957) (purchaser of negligently manufactured ammunition injured by it more than one year after purchase); *Bush v. Norwalk*, 122 Conn. 426, 189 A. 608 (1937) (plaintiff tripped on balance beam more than one year after it was negligently left on the floor—held to be a "continuing" danger), or before he became aware of the injuries, *see, e.g., Cross v. Huttenlocher*, 185 Conn. 390, 400, 440 A.2d 952, 958 (1981) (physician prescribes drugs to patient without warning of side effects); *Puro v. Henry*, 32 Conn.Supp. 118, 342 A.2d 65 (1975) (physician leaves surgical needle in plaintiff's abdomen).

Plaintiff does not allege any acts by defendants that violated his rights subsequent to his arrest on July 3, 1984, and he suggests no reason why the time for accrual for his claims of conspiracy and excessive force should be other than the day of his arrest. There was nothing to prevent plaintiff from bringing suit within three years of that date. And the fact that plaintiff continued to be prosecuted in the state criminal action until May 15, 1987 was not sufficient to toll the limitations period even though one of plaintiff's claims—namely, his malicious prosecution claim—did not accrue until the dismissal of the state criminal action and, hence, fell within the three-year limitations period. *See Singleton*, 632 F.2d at 191-92 (rejecting the plaintiff's argument "that the limitations period [for section 1983 false arrest and assault claims] should be tolled during the period in which the state criminal prosecution was pending against him").

Plaintiff in this case urges the court to adopt the view articulated by Judge Weinstein in his dissent in *Singleton*. Judge Weinstein argued that courts, when determining the date of accrual, should "consider the total transaction reflected in the series of events set forth in the complaint." *Singleton*, 632 F.2d at 202 (Weinstein, J., dissenting). Notwithstanding Judge Weinstein's arguments to the contrary, however, the majority opinion in *Singleton* remains the prevailing view. *See Keating v. Carey*, 706 F.2d 377, 382 (2d Cir.1983); *Rodrigues v. Village of Larchmont*, 608 F.Supp. 467, 477 n. 11 (S.D.N.Y.1985). And, according to the majority opinion in *Singleton*, "[t]he crucial time for accrual purposes is when the plaintiff becomes aware that he is suffering from a wrong for which damages may be recovered in a civil action." *Singleton*, 632 F.2d at 192. "To permit him to wait and toll the running of the statute simply by asserting that a series of separate wrongs were committed pursuant to a conspiracy would be to enable him to defeat the purpose of the time-bar, which is to preclude the resuscitation of stale claims." *Id.* "The existence of a conspiracy does

not postpone the accrual of causes of action arising out of the conspirators' separate wrongs. It is the wrongful act, not the conspiracy, which is actionable. . . ." *Id.*

For these reasons, I find that plaintiff's excessive force and conspiracy claims are barred by Connecticut's three-year statute of limitations. Defendants' motion for summary judgment is therefore granted with respect to those claims.

C.

(i) *Plaintiff's Malicious Prosecution Claim: The Applicable Law*

With regard to plaintiff's claim of malicious prosecution (against defendants Lillis, DiLullo, Pastore, Fish-MacDonald, and John and/or Mary Doe One through Ten) (Count One), the Court is required by 42 U.S.C. § 1988 [1] to turn to state law—in this case, Connecticut state law—to determine the necessary elements. *Conway v. Village of Mount Kisco*, 750 F.2d 205, 214 (2d Cir. 1984), *cert. dismissed* 479 U.S. 84, 107 S.Ct. 390, 93 L.Ed.2d 325 (1986). In *McGann v. Allen*, 105 Conn. 177, 185, 134 A. 810, 813 (1926), the Connecticut Supreme Court set out the elements of a malicious prosecution claim as follows: "In an action for malicious prosecution three things are essential: (1) The discharge of the plaintiff; (2) that the prosecution was without probable cause; and (3) that it was malicious." The *McGann*

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[1] 42 U.S.C. § 1988 provides in pertinent part as follows:

> The jurisdiction in civil . . . matters conferred on the district courts by the provisions of [Title 42] . . . where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil . . . cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . . .

court also stated that "[a]ll who knowingly procure, direct, aid, abet or assist in, or subsequently adopt" the acts constituting the malicious prosecution are liable as joint tortfeasors. *Id.* In the instant case, there is no dispute that the first element is met. The third element, malice, need not be independently established but can be inferred from the absence of probable cause. *See, e.g., Zenik v. O'Brien*, 137 Conn. 592, 596-97, 79 A.2d 769, 772 (1951); *State v. Cutler*, 33 Conn. Supp. 158, 163, 366 A.2d 805, 808 (1976). Thus, the central question on plaintiff's malicious prosecution claim is whether there is a genuine issue of material fact concerning the existence of probable cause to arrest and prosecute the plaintiff for the murder of Penny Serra.

(ii) *The Preclusive Effect of State Court Finding of Probable Cause*

Before addressing the question of whether or not there was probable cause, however, it is necessary first to address defendants' contention that the state court's probable cause hearing (and the finding of probable cause at that hearing by Judge Kinney) gives rise to a defense of collateral estoppel, precluding "relitigation" of the question of whether there was probable cause. *See* Reply to Plaintiff's Memorandum of Law in Opposition to the Defendants' Motion for Summary Judgment (filed Dec. 7, 1990) ("Defendants' Reply") at 31-33. Plaintiff argues in response that the issue of probable cause was not fully and fairly litigated in the state court inasmuch as plaintiff "was barred from presenting evidence." Plaintiff's Response at 26. Defendants do not dispute that plaintiff was not permitted to present evidence, but they argue in turn that plaintiff had requested to present his own evidence and that Judge Kinney—after considering plaintiff's written offer of proof and finding that the proffered evidence would not undermine the showing of probable cause—denied plaintiff's request. Defendants' Reply at 31-32.

In support of the proposition that the state court's finding of probable cause acts as a bar to relitigation of that issue, defendants rely upon *Coogan v. City of Wixom*, 820 F.2d 170 (6th Cir.1987) in which the court stated that

> [w]here the state affords an opportunity for an accused to contest probable cause at a preliminary hearing and the accused does so, a finding of probable cause by the examining magistrate or state judge should foreclose relitigation of that finding in a subsequent § 1983 action.

Id. at 175. This authority, however, does not settle the matter. To begin with, it is not clear that plaintiff Golino was given "an opportunity . . . to contest probable cause at a preliminary hearing" in the state criminal case before Judge Kinney. The court in *Coogan* was applying Michigan law, under which "a preliminary hearing is an adversary proceeding," inasmuch as "an accused has the right to call witnesses and cross-examine witnesses produced by the State." *Id.* As stated above, there is no dispute in the instant case that plaintiff was barred from presenting any evidence at the preliminary hearing in the state criminal case.

Moreover, *Coogan* is the only authority that defendants offer. Presumably, many, if not all, section 1983 cases in which a plaintiff makes a claim for malicious prosecution stem from criminal cases in which probable cause was contested at a preliminary hearing; yet, with the possible exception of *Coogan*, defendants have offered, and the court has found, no other authority for the proposition that a finding at a preliminary probable cause hearing in a criminal matter forecloses relitigation of that finding in a subsequent section 1983 action. Indeed, even in *Coogan*, that proposition is offered only as an argument in the alternative. The court in *Coogan* itself "relitigated" the issue and, in doing so, "determined that plaintiff failed to establish the absence of probable cause un-

der Michigan law." *Id.* at 174. Additionally, the *Coogan* court stated that the lower court in that case had "properly directed a verdict on the state claim of malicious prosecution," *id.* at 173, when it found that the plaintiff had offered no facts that negated the finding of probable cause, implying that there was nothing inappropriate about the lower court's "relitigation" of the probable cause issue.

Absent any persuasive argument or authority to the contrary, therefore, I find that the state court's probable cause hearing and the finding of probable cause by Judge Kinney have no preclusive effect in the instant case.

(iii) *The Merits of the Probable Cause Question*

As a general matter, "probable cause to arrest exists when the authorities have knowledge or reasonably trustworthy information sufficient to warrant a person of reasonable caution in the belief that an offense has been committed by the person to be arrested." *Calamia v. City of New York*, 879 F.2d 1025, 1032 (2d Cir.1989). *See generally Illinois v. Gates*, 462 U.S. 213, 241-46, 103 S.Ct. 2317, 2333-36, 76 L.Ed.2d 527 (1983). With regard to the question of probable cause, plaintiff does not argue that the arrest warrant affidavit was somehow deficient on its face. Instead, plaintiff contends that the arrest warrant affidavit contained material omissions and false statements. This sort of "subfacial" attack on an arrest warrant is governed by the standards established in *Franks v. Delaware*, 438 U.S. 154, 171-72, 98 S.Ct. 2674, 2684-85, 57 L.Ed.2d 667 (1978), *see, e.g., Willocks v. Dodenhoff*, 110 F.R.D. 652, 656-59 (D.Conn.) (Blumenfeld, J.) (applying *Franks* standard in section 1983 action and reviewing relevant case law indicating "that constitutional rights should be applied congruently in criminal suppression hearings and section 1983 damage actions"), *aff'd*, 805 F.2d 392 (2d Cir.1986).

Under *Franks*, the party challenging the warrant has the burden of, first, making a substantial showing of

evidence "that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit," and, second, establishing that "the allegedly false statement is necessary to the finding of probable cause." *Franks*, 438 U.S. at 155-56, 98 S.Ct. at 2676. Plaintiff in the instant case must, to survive defendants' summary judgment motion, provide sufficient evidence that a reasonable jury could find for him under this *Franks* standard. *Cf. Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254-55, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986) ("The question here is whether a jury could reasonably find *either* that the plaintiff proved his case by the quality and quantity of evidence required by the governing law *or* that he did not." (emphasis in original)).

Based on a full review of the record before me, I find that there are genuine issues of material fact precluding summary judgment on plaintiff's malicious prosecution claim. Plaintiff has made the requisite showing that a reasonable jury could find that the entire set or some subset of the omissions and false statements in the arrest warrant affidavit was material to a finding of probable cause and, moreover, that those omissions and false statements were made knowingly, intentionally or with reckless disregard for the truth.[2] That set includes, but is

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[2] There is no dispute that the arrest warrant affidavit contained several omissions and false statements, although there is dispute over whether those omissions and false statements were "material." Among other things, the affidavit omitted (1) descriptions of the suspect provided by four witnesses, (2) prior statements of Joyce Carasone Lupone that were inconsistent with statements attributed to her in the affidavit, (3) the full description of the suspect's car as provided by one eyewitness, (4) plaintiff's sister's statements that plaintiff had the scar on his left wrist since childhood, (5) evidence that fingerprints on Ms. Serra's car which were strongly believed to belong to Ms. Serra's killer did not match plaintiff's fingerprints, (6) the fact that investigators had not verified plaintiff's blood type, and (7) the fact that plaintiff was unmarried and lived in New Haven in 1973. There were also several false statements

certainly not limited to,[3] the undisputed fact that the arrest warrant affidavit made no mention of the fact that an eyewitness, Gary Hryb, had positively identified another suspect within hours of the murder. *See* Plaintiff's Response at 18; Defendants' Reply at 10.

Defendants argue in response that the Hryb identification was "unreliable" and therefore would not negate probable cause. *Id.* Defendants, however, provide no direct authority for the proposition that an unreliable identification could not ,as a matter of law, be material to the finding of probable cause. Moreover, even if it were the case that the omission of an "unreliable" identification would not constitute a material omission for these purposes, defendant does not define what is meant by "unreliable." Or, put differently, defendant does not explain at what point along the spectrum of reliability an eyewitness's identification should, as a matter of law, be deemed "unreliable." The evidence that defendants provide in support of their conclusion—including, primarily, evidence that "Hryb was believed to be under the influence of marijuana" when he observed the third-party suspect, Defendants' Memorandum at 10; *see also* Defendants' Reply at 10 (emphasizing this evidence)—is not sufficient for the court to find, as a matter of law, that the identification by Hryb would not have negated probable cause.

Defendants cite three cases in support of their argument. *Id.* 10-11. These cases, however, provide little

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contained in the warrant affidavit including the statements (1) that plaintiff "frequently visited" the W.T. Grant Store in New Haven, (2) that Diana Morrone and Patricia Capone Anderson described an ace bandage on plaintiff's "left wrist," (3) that plaintiff cancelled "all" scheduled meetings with defendants during the investigation, and (4) that Neil Russo, an informant, told police that plaintiff had gone to school with and dated Penny Serra. *See* Plaintiff's Response at 17-24; Defendants' Reply at 7-25.

[3] *See supra* note 2.

support for defendants' conclusion. In the first case, *Ogden v. D.C.*, 676 F.Supp. 324 (D.D.C.1987), *aff'd*, 861 F.2d 303 (D.C.Cir.1988), the eyewitness identification had been included in, not *excluded from*, the affidavit, and the court held that the fact that information regarding the eyewitness identification was omitted from the warrant affidavit—that is, that the eyewitness had been drinking and had initially failed to make the identification—did not necessarily vitiate the finding of probable cause.[4] In at least two respects, this holding appears to be contrary to defendants' position in the instant case. First, it suggests that the fact that Gary Hryb might have been under the influence of a behavior-altering substance does not necessarily render his identification immaterial (just as it was immaterial that the eyewitness in *Ogden* was under the influence of alcohol when he witnessed the murder). Second, the *Ogden* holding suggests that eyewitness identifications, even when they are flawed in some respects, are likely to be material to a finding of probable cause. As the court in *Ogden* stated, "an officer's claim of an eyewitness identification of a murder suspect carries heavy weight in making a probable cause determination." *Id.* at 327. If anything, that statement supports plaintiff's contention in the instant case that the omission of the eyewitness identification was a material omission.

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[4] It is worth noting that the *Ogden* court did not squarely address the question of whether the omission of the information regarding the eyewitness negated probable cause. The court stated simply that it was "not convinced" that the omission of that information "necessarily negate[s] probable cause." *Ogden*, 676 F.Supp. at 327. The *Ogden* court's grant of summary judgment for the defendant on plaintiff's section 1983 claims appears to be based primarily on different grounds—that is, that the defendant in that case was entitled to qualified immunity. *Id.* at 327-28. As the court in *Ogden* put it: "After extensive review of the undisputed facts, the court finds that even if probable cause would have been negated by inclusion of additional facts in the affidavit, [defendant's] conduct was objectively reasonable." *Id.* at 328.

The court in *United States v. Lewis*, 425 F.Supp. 1166, 1174 (D.Conn.1977) (Blumenfeld, J.)—the second case cited by defendants—held that the omission of the fact that six witnesses *failed* to make identification did not in itself negate probable cause when the affidavit included one positive identification. This case also appears to support plaintiff inasmuch as it emphasizes the importance of an eyewitness identification to a finding of probable cause and, by implication, the materiality of omitting an eyewitness identification. "[T]he significant weight to be given to an eyewitness identification is revealed by the fact that a single identification by an eyewitness may in and of itself support a finding of probable cause." *Id.*

Finally, defendants rely on *Holdeman v. Consolidated Rail Corp.*, 649 F.Supp. 1188, 1199 (N.D.Ind.1986). The court in *Holdeman* held that an eyewitness's later indication that "he could not be sure of the identification of Mr. Holdeman" did not necessarily negate the finding of probable cause with regard to that suspect. But *Holdeman* is inapposite. In the instant case, plaintiff is arguing that the *omission* of the fact that an eyewitness *did* identify a suspect other than plaintiff may undermine probable cause.

Based on the record as it now stands, it appears that plaintiff has made a substantial preliminary showing that (1) the arrest warrant affidavit contained this omission, as well as other omissions and false statements,[5] (2) these alleged defects in the arrest warrant affidavit were made knowingly, intentionally or with reckless disregard for the truth, and (3) these alleged defects, especially when taken together, are material to the finding of probable cause—that is, absent the defects there does not "remain[] sufficient content in the warrant affidavit to support a finding of probable cause." *Franks v. Delaware*, 438 U.S. 154, 155-56, 172, 98 S.Ct. 2674, 2676-77,

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[5] *See supra* note 2.

2684, 57 L.Ed.2d 667 (1978); *see also Willocks v. Dodenhoff*, 110 F.R.D. 652, 657 (D.Conn.1986). Accordingly, plaintiff is entitled to a hearing by a finder of fact. *Franks*, 438 U.S. at 172, 98 S.Ct. at 2684-85. Put differently, plaintiff in this case is entitled to have a jury trial on his claim of malicious prosecution.

Of course, whether plaintiff will prevail at trial is another issue. Again, I intimate no view whatsoever on what is, ultimately, a question of fact. I am mindful of defendants' argument that some deference should be paid to the finding of probable cause by Judge Kinney in the state case and of the arguments made by defendants that the omissions and the false statements in the arrest warrant affidavit were immaterial to the finding of probable cause. But in my view, plaintiff has provided enough evidence for a reasonable jury to find to the contrary. A summary judgment motion is not the place to resolve that dispute. As our Court of Appeals has stated repeatedly, " 'on a motion for summary judgment the court cannot try issues of fact; it can only determine whether there are issues to be tried.' " *Schering Corp. v. Home Ins. Co.*, 712 F.2d 4, 9 (2d Cir.1983) (quoting *Heyman v. Commerce & Indus. Ins. Co.*, 524 F.2d 1317, 1319-20 (2d Cir.1975)). For these reasons, it appears that defendants' motion for summary judgment with regard to plaintiff's malicious prosecution claim must be denied.

(iv) *The Question of Qualified Immunity*

Defendants argue in the alternative, however, that summary judgment should be granted on plaintiff's malicious prosecution claim because defendants are entitled to qualified immunity. I disagree.

Police officers are qualifiedly immune from suits for civil damages alleging violations of federal law. When the circumstances surrounding an officer's actions are undisputed and when the undisputed facts, together with inferences that may properly be drawn from those facts,

show that the officer is entitled to qualified immunity, the issue of qualified immunity can be decided on a motion for summary judgment. *See Anderson v. Creighton*, 483 U.S. 635, 641, 107 S.Ct. 3034, 3039-40, 97 L.Ed.2d 523 (1987); *Schiff v. Kerrigan*, 625 F.Supp. 704, 708 (D. Conn.1986). However, because a police officer's immunity is only qualified, his conduct may or may not be shielded from liability depending on the circumstances. Additional facts may be needed in order to determine if immunity is available. *See Lawson v. Abrams*, 863 F.2d 260, 262-63 (2d Cir.1988); *White v. Frank*, 855 F.2d 956, 958, 962 (2d Cir.1988); *Kaminsky v. Rosenblum*, 929 F.2d 922, 926-27 (2d Cir.1991).

The question of immunity is distinct from, albeit related to, the question of probable cause. *Magnotti v. Kuntz*, 918 F.2d 364, 367 (2d Cir.1990); *Warren v. Dwyer*, 906 F.2d 70, 75 (2d Cir.1990). There may be circumstances, in other words, in which there was not probable cause—for example, because there was less than sufficient knowledge or information "to warrant a person of reasonable caution in the belief that" plaintiff had committed the offense, *Calamia v. City of New York*, 879 F.2d 1025, 1032 (2d Cir.1989)—but in which the officers are nevertheless qualifiedly immune because it was objectively reasonable for the officers to believe they were not violating plaintiff's rights. *Creighton*, 483 U.S. at 641, 107 S.Ct. at 3039-40; *Magnotti*, 918 F.2d at 367.

Such circumstances occur (1) when "it was not clear at the time of the official acts that the interest asserted by the plaintiff was protected by a federal statute or the Constitution," *Robison v. Via*, 81 F.2d 913, 920-21 (2d Cir.1987), or (2) when "it was not clear at the time of the acts at issue that an exception did not permit those acts," *id.* at 921, or (3), when, because of the particular factual situation surrounding the official acts, it was objectively reasonable for defendants to believe that their acts did not violate plaintiff's rights under the law as it existed at the time of the acts, *id.*; *see also Creighton*,

483 U.S. at 638, 107 S.Ct. at 3038; *Malley v. Briggs*, 475 U.S. 335, 344, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986); *Warren*, 906 F.2d at 77 (Winter, J., dissenting); *Kaminsky*, 929 F.2d at 925 ("If the right is so generalized that its application in the factual context of the case is subject to doubt, the immunity defense may bar action against the official.").

The first two routes to qualified immunity can be ruled on as a matter of law exclusively. In this case, the alleged constitutional violation complained of by plaintiff involves a right that was clearly established and was not subject to an exception at the time of his arrest—that is, the right not to be arrested without probable cause. *Robison*, 821 F.2d at 921. Thus, qualified immunity does not appear to be available to defendants in this case on either of these legal grounds.

The third route to qualified immunity "has its principal focus on the particular facts of the case." *Id.* "[T]he court ruling on the qualified immunity issue must know what the facts were that the officer faced or perceived, *and the finding of those facts* appears to be a matter for the jury . . . presumably to be handled by the framing of special interrogatories." *Warren*, 906 F.2d at 77 (Winter, J., dissenting) (emphasis added); *accord id.* at 76 (Kaufman, J. for himself and Feinberg, J.). Viewing the evidence in the light most favorable to the plaintiff and drawing all inferences favorable to the plaintiff, the court cannot, based upon a full review of the record as it now stands, find that as a matter of law it was "objectively reasonable for the defendants to believe that they were acting in a fashion that did not violate an established federally protected right." *Hurlman v. Rice*, 927 F.2d 74, 79 (2d Cir.1991); *Robison*, 821 F.2d at 921. Accordingly, defendants' motion for summary judgment on the basis of qualified immunity is denied.

Whether defendants are entitled to qualified immunity is ultimately a question of law for the court to decide.

See Warren, 906 F.2d at 76; *Finnegan v. Fountain*, 915 F.2d 817 (2d Cir. 1990). *But cf. Hurlman*, 921 F.2d at 78-79 (seeming to imply that the issue of qualified immunity may be a question for the jury); *Calamia v. City of New York*, 879 F.2d 1025, 1035-36 (2d Cir. 1989) (same); *Robison*, 821 F.2d at 921 (same). The denial of defendants' motion for summary judgment with respect to the qualified immunity defense is therefore without prejudice to renewal in due course on a motion for a directed verdict or on a motion for judgment notwithstanding the verdict. *See Warren*, 906 F.2d at 74 (explaining that because "[p]re-trial resolution of the defense . . . may be thwarted by a factual dispute or require further discovery," the defense may be raised on such motions). At trial, the primary task for the jury will be to determine whether defendants had probable cause to arrest plaintiff. If the jury finds that there was probable cause for the arrest, then the qualified immunity defense will not be reached. If, on the other hand, the jury finds that there was no probable cause, defendants' qualified immunity defense will fail as a matter of law *unless* there is evidence in the record to suggest that the particular factual circumstances surrounding plaintiff's arrest made it objectively reasonable for the defendants to believe that they were not violating plaintiff's rights in arresting him. Insofar as such evidence creates genuine issues of material fact, the jury will be asked to decide the unresolved factual issues on special interrogatories. *See id.* at 76 (explaining that this is the proper procedure for settling any unresolved factual issues before the court decides the question of qualified immunity); *accord id.* at 77 (Winter, J., dissenting). In any case, if the evidence (and, if necessary, the jury's findings) suggest that it may have been objectively reasonable for defendants to believe that they were acting in a fashion that did not clearly violate an established federally protected right, then the court will determine whether, on the facts found, it *was* objectively reasonable for the

defendants to so believe. *Id.* at 76; *see also Kaminsky v. Rosenblum*, 929 F.2d at 926-27.

D.

Defendants argue that summary judgment should be entered with respect to the claims against Police Chief William Farrell and the City of New Haven because plaintiff has not produced sufficient evidence to sustain all elements of his municipal and supervisory liability claims. I agree.

There is no dispute as to the standards governing claims for supervisory and municipal liability under section 1983. *See* Defendants' Memorandum at 26-27; Plaintiff's Response at 30. A supervisor may be liable for the unlawful acts of subordinate governmental actors if he had "actual or constructive notice of unconstitutional practices and demonstrate[d] gross negligence or deliberate indifference by failing to act." *Al-Jundi v. Estate of Rockefeller*, 885 F.2d 1060, 1066 (2d Cir.1989) (quotation marks omitted); *see also Williams v. Smith*, 781 F.2d 319, 323-24 (2d Cir.1986) (a supervisor may be liable if "he learned of the violation and failed to remedy the wrong, if he created or permitted the policy or custom under which the unconstitutional practices occurred, or if he was grossly negligent in managing subordinates who caused the violation"). A municipality may

> be liable under § 1983 only where its policies are the "moving force [behind] the constitutional violation." Only where a municipality's failure to train its employees in a relevant respect evidences a "deliberate indifference" to the rights of its inhabitants can such a shortcoming be properly thought of as a city "policy or custom" that is actionable under § 1983.

City of Canton, Ohio v. Harris, 489 U.S. 378, 389-90, 109 S.Ct. 1197, 1205, 103 L.Ed.2d 412 (1989) (citing *Monell v. New York City Dep't of Social Servs.*, 436 U.S.

658, 694, 98 S.Ct. 2018, 2037-38, 56 L.E.2d 611 (1978) and *Polk County v. Dodson*, 454 U.S. 312, 326, 102 S.Ct. 445, 454, 70 L.Ed.2d 509 (1981)).

Plaintiff has offered no evidence which could meet either of these standards. Plaintiff does assert that "[i]n light of the severe and blatant misconduct manifest in this case, [Chief Farrell's] detached approach to training and supervision clearly constitutes the sort of gross negligence and deliberate indifference giving rise to supervisory and municipal liability." Plaintiff's Response at 32. Assuming only for the argument that there was some "misconduct" here on the part of the police officers, plaintiff offers no evidence that Chief Farrell is liable for it. *See Al-Jundi*, 885 F.2d at 1065 ("liability cannot attach under the doctrine of *respondeat superior*"); *id.* at 1066 ("personal involvement of defendant[] . . . is a prerequisite"); *id.* (supervisory liability attaches if official had actual or constructive notice of unconstitutional practices and demonstrated gross negligence or deliberate indifference by failing to act). Nor does plaintiff provide any evidence that would give rise to an inference of a policy or custom of constitutional deprivations. Plaintiff cites no other allegedly unconstitutional arrests; his own arrest, assuming for the argument that it was unconstitutional, does not establish a policy or custom. *See, e.g., Sarus v. Rotundo*, 831 F.2d 397, 402 (2d Cir.1987) (reversing denial of city's and police chief's motions for directed verdict and j.n.o.v where no other incident of misconduct presented); *Turpin v. Mailet*, 619 F.2d 196, 202, 203 (2d Cir.1980) (reversing jury verdict against city where only evidence was plaintiff's own arrest and city's previous failure to discipline arresting officer in another instance of excessive force), *cert. denied*, 449 U.S. 1016, 101 S.Ct. 577, 66 L.Ed.2d 475 (1980). Plaintiff does claim that defendant Mary Fish, a police officer who investigated the Serra homicide, was inadequately trained in skills essential to a homicide de-

tective and that none of the defendants were sufficiently trained in the use of force. Plaintiff's Response at 31. Again, however, plaintiff offers no evidence in support of those claims. As our Court of Appeals has made clear, mere conclusory allegations in legal memoranda are not evidence and, by themselves, cannot create a genuine issue of material fact. *See Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir.1980). Accordingly, defendants' motion for summary judgment with respect to plaintiff's claims against defendants City of New Haven and Police Chief Farrell is granted.

CONCLUSION

For the reasons stated above, defendants' motion for summary judgment (filed Aug. 10, 1990) is DENIED with respect to plaintiff's claim of malicious prosecution (against defendants Lillis, DiLullo, Pastore, Fish-MacDonald, and John and/or Mary Doe One through Ten) and GRANTED with respect to plaintiff's claims of conspiracy (against defendants Lillis, DiLullo, Pastore, Fish-MacDonald, Lupone, and John and/or Mary Doe One through Ten), arrest with excessive force (against defendants Lillis, DiLullo, Pastore, Fish-MacDonald, and John and/or Mary Doe One through Ten), supervisory liability (against defendant Farrell) and municipal liability (against defendant City of New Haven).

It is so ordered.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 7th day of February, on thousand nine hundred and ninety-two.

Docket Number: 91-7600

ANTHONY GOLINO,
Plaintiff-Appellee,

v.

ROBERT LILLIS, LEONARD PASTORE, ANTHONY DILULLO and MARY FISH-MACDONALD,
Defendants-Appellants.

[Filed Feb. 7, 1992]

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by defendants-appellants, Robert Lillis, Leonard Pastore, Anthony Dilullo and Mary Fish-MacDonald. –

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested

that a vote be taken thereon. Judge Winter disqualified himself from voting.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk

By: /s/ Carolyn Clark Laughlin
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 3rd day of December, one thousand nine hundred and ninety-one.

Present: HON. IRVING R. KAUFMAN
HON. AMALYA L. KEARSE
HON. JOSEPH M. MCLAUGHLIN
Circuit Judges,

91-7600

ANTHONY GOLINO,
Plaintiff-Appellee,

v.

CITY OF NEW HAVEN, WILLIAM FARRELL, ROBERT LILLIS, ANTHONY DILULLO, LEONARD PASTORE, MARY FISH-MCDONALD, JOYCE CARASONE LUPONE, JOHN AND/OR MARY DOE ONE THROUGH JOHN AND/OR MARY DOE TEN, BEING OFFICERS, AGENTS OR EMPLOYEES OF THE CITY OF NEW HAVEN, THE STATE OF CONNECTICUT OR THOSE ACTING IN CONCERN WITH THEM, WHOSE NAMES ARE PRESENTLY UNKNOWN TO THE PLAINTIFF,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Connecticut

MANDATE

[Filed Dec. 3, 1991]

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED and DECREED that the order of said district court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

ELAINE B. GOLDSMITH
Clerk

By: /s/ Edward J. Guardaro
EDWARD J. GUARDARO
Deputy Clerk

ISSUED AS MANDATE: March 13, 1992

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil No. N-85-252 (EBB)

GEORGE GRECO, JR.

v.

JOSEPH S. HOWARD, *et al.*

RULING ON DEFENDANTS'
MOTIONS FOR SUMMARY JUDGMENT

Plaintiff's civil rights action is predictaed on his claim that he "was arrested for several crimes of which he was completely innocent, because the defendants withheld material exculpatory evidence from judges and prosecutors and because the defendants failed to conduct reasonable investigations of the crimes in question." Amended Complaint ¶ 1 (Nov. 13, 1985) ["Complaint"]. Greco alleges violations of the first, fourth, fifth, sixth, eighth, ninth, and fourteenth amendments to the United States Constitution, *id.* ¶9, as secured by 42 U.S.C. §§ 1983, 1988, and the laws of the State of Connecticut, *id.* ¶ 57.

FACTS

Defendants Howard and MacDonald are New Haven police officers. Complaint ¶ 4; Howard Aff. ¶ 1; MacDonald Aff. ¶ 1. Both detectives were investigating armed robberies that occurred on May 5 and May 30, 1983, at the Arco AM/PM Mini-Mart in New Haven, Complaint ¶¶ 10, 11, 13, 14; Howard Aff. ¶¶ 2, 3; MacDonald Aff. ¶¶ 2, 3, and at a New Haven Subway store on May 22,

1983, Defendants' Exhibit C-42. Howard and MacDonald claim and plaintiff does not dispute that they were investigating a series of armed robberies in the greater New Haven area committed, in all probability, by the same white male. Howard Aff. ¶ 2; MacDonald Aff. ¶ 2; Defendants' Exhibits C-38, C-42. Defendant Howard avers that, based on videotapes of the AM/PM Mini-Mart robberies taken by a surveillance camera, he surmised that the perpetrator was the same person in each robbery. Howard Aff. ¶ 3. Plaintiff does not disagree. Complaint ¶ 14. The store owner, a Greco family member, *see* Motion for Summary Judgment at 3; Opposition Memorandum at 2, reached the same conclusion and so informed the original investigating police officer. Defendant's Exhibit C-37, at 2; Complaint ¶ 12. Defendant Howard selected a photo of plaintiff Greco from the police photo archives as resembling the perpetrator. Howard ¶ 4. He developed a photo array of several suspects, including the plaintiff. *Id.*; Defendants' Exhibit A-1. The photo array was shown to the victims of both robberies at the AM/PM Mini-Mart on June 9, 1983. Pamela Greco, an employee who was working during the May 5th robbery, stated that plaintiff was not the person who committed the crime. Complaint ¶ 15; Howard Aff. ¶ 5; MacDonald Aff. ¶ 5. Defendants claim, and plaintiff does not dispute, that Ms. Greco's reaction to the photo was "sharp," and she explained that she recognized one person in the array as her cousin, George Greco, Jr., plaintiff herein. Howard Aff. ¶ 5; MacDonald Aff. ¶ 5. Delores DeFrancesco, the store manager and another Greco family member, noted plaintiff's strong resemblance to the perpetrator but indicated that Pamela would have recognized George had he committed the crime. Plaintiff's Material Facts ¶ 1(c); Defendants' Exhibit C-42, at 3; MacDonald Aff. ¶ 8. When the photo array was shown to Curtis Williams, the employee present during the May 30th robbery, he identified plaintiff as the perpetrator, Complaint ¶ 16; Howard Aff. ¶ 6; MacDonald Aff. ¶ 7;

Defendants' Exhibit C-33 (Statement of Curtis Williams), and signed an affidavit to that effect. Defendants' Exhibit C-27. The photo array also was sent to other towns experiencing similar robberies. Fairfield was one of these communities. Kowats Aff. ¶ 4 (Oct. 26, 1988).

On June 10, 1983, Detective MacDonald applied for an arrest warrant for George Greco, Jr., for the armed robbery of the AM/PM Mini Mart on May 30, 1983. Defendants' Exhibit C-7. MacDonald noted plaintiff's physical resemblance to the perpetrator, his prior drug-possession conviction, and Mr. Williams's positive identification of plaintiff from the photo array. *Id.* The warrant issued on that same day, charging robbery first degree and larceny second degree. *Id.* Greco turned himself in at the Fairfield police station, where he was arrested by Detective Howard. Howard Aff. ¶ 7.

At the New Haven police station, where plaintiff was processed, the Greco family appeared with Mr. Williams, who was afforded an opportunity to view George Greco, Jr. in person. Defendant Howard claims that Williams expressed doubt that Greco was the perpetrator of the May 30 robbery. Howard Aff. ¶ 7. Plaintiff claims that Williams stated "that he was positive [Greco] was not the person who robbed him on May 30, 1983." There is no suggestion on the record that plaintiff saw or overheard the recantation. Indeed he argues elsewhere that defendants withheld this information from his attorney and him. Complaint ¶ 22. Neither rendition is supported in the record by an affidavit from or deposition of Williams or the Greco family members, but Detective Howard avers that he "believe[d] that [Williams] had in good faith changed his mind." Howard Aff. ¶ 8. Detective Howard noted Williams's denial that his change of heart derived from any pressure applied by the Greco family. Defendants' Exhibit C-42. Bond was set at $3,000, *id.*, which plaintiff apparently was unable to post until the next day, June 11, 1983, *see* Defendants' Exhibit C-8, when he was released from incarceration. Defendants' Exhibit C-9.

On July 29, 1983, plaintiff was arrested in Fairfield and charged with a robbery that the Fairfield defendants believed was related to the May 30th holdup in New Haven. Complaint ¶¶ 33, 35. Victims of the June 8th robbery identified Greco's picture in the photo array received from the New Haven defendants. Russo Aff. ¶ 2; Kowats Aff. ¶ 5.

On August 22, 1983, Gary Alexander was arrested. He confessed to each of the relevant New Haven and Fairfield crimes, as well as dozens of others. Complaint ¶¶ 30, 43; Defendants' Exhibit C-34 (Statement of Gary Alexander) . The charges against Greco in New Haven were dismissed on August 31, 1983. Defendants' Exhibit C-19. The Fairfield charges were also dismissed although neither plaintiff nor defendants have supplied the date of dismissal.

In their motion for summary judgment, defendants Howard and MacDonald argue that their reliance on Williams's identification of plaintiff on June 9, 1983, served to establish probable cause for the arrest warrant, notwithstanding their failure to include Pamela Greco's statements in the warrant application. Motion for Summary Judgment at 5-8. They also argue that the prosecutors were informed of Williams's doubts in a timely fashion. *Id.* at 8-11. Defendants contend that their negligence, if any, in failing to inform surrounding area police departments of Williams's recantation is not a constitutional tort. *Id.* at 11-13. They also claim good faith immunity. *Id.* 13-16. In support of their motion, defendants each submitted an affidavit, the photo array including plaintiff's picture, and a photo of Gary Alexander, as well as all police, prosecutorial, and court records relating to this matter.

Plaintiff argues in his opposition memorandum that defendants violated his first amendment rights by intentionally continuing the criminal prosecution against him even though they knew he was innocent in order to obtain

a civil liability release. Opposition Memorandum at 5. He also claims that any bond requirement in a case where the officers "*knew and believed*" that plaintiff was innocent raises the question of whether the bond was excessive, thereby violating plaintiff's eighth and fourteenth amendment rights. *Id.* at 6. Plaintiff argues that material omissions from the warrant application, in this case of exculpatory information, arguably invalidated the probable cause finding, thus rendering plaintiff's arrest a violation of his fourth amendment rights. *Id.* Plaintiff contends that even if defendants acted in good faith, it remains for the jury to evaluate their conduct, not the court. *Id.* at 7. Plaintiff has submitted nothing other than his opposition memorandum, and a statement of disputed "facts," presumably to comply with Local Rule 9(c). Plaintiff maintains that "the materials submitted by the defendants in support of their motion strengthen and expand the plaintiff's claim." *Id.*

DISCUSSION

In order to grant a motion for summary judgment, the court must determine that there is no "genuine issue as to any material fact" and that "the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A "material" fact is one whose resolution will affect the ultimate determination of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual dispute is "genuine" when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The party opposing summary judgment must prove a factual basis for its allegations and may not rely on "mere speculation or conjecture as to the true nature of the facts." *Knight v. United States Fire Ins. Co.*, 804 F.2d 9, 12 (2d Cir. 1986), *cert. denied*, 480 U.S. 932 (1987). In determining whether a material issue of fact exists, the court must resolve all ambiguities and draw all inferences against the moving party. In the civil rights context, the United States Su-

preme Court approves of summary resolution of section 1983 claims. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

A. *Release-Dismissal Agreement*

A release-dismissal agreement exists when a criminal defendant releases his right to file a § 1983 action in return for a prosecutor's dismissal of pending criminal charges. *Newton v. Rumery*, 480 U.S. 386 (1987). Such agreements do not *per se* violate constitutional rights. *Id.* at 392. In the instant case, however, no such agreement was reached. Indeed, plaintiff does not allege that the subject was broached either with his attorney or with him. The only evidence plaintiff can point to is the prosecutor's notes, indicating that Detective Howard requested an attempt to obtain a waiver of civil action from Greco. *See* Defendants' Exhibit C-2, C-2-A. As no triable issue exists, summary judgment on this issue is appropriate.

B. *Omissions from the Warrant Application*

The fourth amendment requires that a warrant affidavit make a truthful showing. *Franks v. Delaware*, 438 U.S. 154, 164-65 (1978). Challenges to the veracity of a warrant affidavit are permissible in limited circumstances. In the criminal context, the defendant must make "a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit." *Franks, supra*, 438 U.S. at 155-56. If a court determines that the allegedly false statement was necessary to the probable cause determination, a hearing will be held, affording the defendant the opportunity to establish the allegation of falsity or reckless disregard. If the defendant is successful, the court will review the affidavit absent the suspect statements to determine if the remaining content continues to establish

the requisite probable cause. If not, the warrant will be voided. *Id.* at 156.

The omission of material information from a warrant affidavit is subject to the same analysis. *United States v. Marin-Buitrago*, 734 F.2d 889, 895 & n.8 (2d Cir. 1984); *United States v. Lewis*, 425 F. Supp. 1166, 1173 (D. Conn. 1977). An omission of facts does not rise to a material misrepresentation unless they cast doubt on the existence of probable cause. *Marin-Buitrago, supra*, 734 F.2d at 895; *United States v. Dennis*, 625 F.2d 782, 791 (8th Cir. 1980). "The omitted information and the information in the affidavit must be considered as a whole in determining if probable cause continues to exist." *Marin-Buitrago, supra*, 734 F.2d at 895. The necessary predicate to such a determination continues to be a showing that the omissions were made intentionally or knowingly, or with reckless disregard for the truth. *United States v. Mankani*, 738 F.2d 538, 545 (2d Cir. 1984). It is not enough to show that the warrant affiant did "pick and choose" what to include and what to omit in order to demonstrate that the omissions were made intentionally or recklessly. *Mankani, supra*, 738 F.2d at 546.

In the instant action, Detective MacDonald avers that

> On the basis, therefore, of [William's] high degree of certainty plus George Greco's history of drug involvement and an obvious likeness to the subject in the video tape, I felt that I had probable cause to apply for an arrest warrant, which I did. I was aware of Pamela Greco's statement when I prepared my application for the arrest warrant. Additionally, I was aware that Delores DeFrancesco, manager of the Am/Pm Mini-Mart and relative to both George and Pamela Greco, stated that the perpetrator strongly resembled her cousin George Greco. Because of the direct blood link to the accused as well as the strength of an impartial victim's positive iden-

> tification and the (sic) Greco's resemblance to the videotaped robber, I concluded that logically Ms. Greco's emotional attachment to the accused, did not detract from the probable cause established.

MacDonald Aff. ¶ 8. Detective Howard agreed.

> When we showed [Williams] the photo array, he immediately picked out the picture of George Greco and said that he was quite certain that George Greco was the robber. He went back and examined the photos several times over and repeated that he was sure that he had the right man. Because he had no reason whatever to tell anything but the whole truth, we had great confidence in his certainty that George Greco was the robber. On that basis Detective MacDonald applied for a warrant for his arrest.

Howard Aff. ¶ 6.

United States v. Lewis, supra, 425 F. Supp. 1166 (D. Conn. 1977), relied on by defendants, is instructive but not persuasive.[1] In *Lewis*, a photo array was shown to eyewitnesses of a bank robbery, as well as to two people in the vicinity of the bank at the relevant time. *Id.* at 1173. Only the bank manager made a positive identification of *Lewis*. The arrest warrant affidavit referred to the identification but did not indicate that six other

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[1] Plaintiff argues that *Lewis* has been undermined by more recent and controlling authority. Opposition Memorandum at 6. The court disagrees. *Lewis* antedated *Franks*, but Judge Blumenfeld used a *Franks*-type analysis in deciding *Lewis*. He conducted a dual inquiry: first, determining whether the omission resulted from a purposeful intent to deceive the issuing judicial officer and second, determining whether the omission materially affected the finding of probable cause. 425 F. Supp. at 1173. The cases decided after *Franks* and cited by plaintiff merely serve to state expressly the *Franks* analysis, while continuing to hold that material omissions from a warrant affidavit may serve to vitiate a finding of probable cause. *Mankani, supra*, 738 F.2d at 545-46; *Marin-Buitrago, supra*, 734 F.2d at 894-95.

people failed to make an identification. *Id.* The court held that the omission of this fact by the detective was, at most, negligent and that the omitted information did not negate the probable cause determination. *Id.* at 1173-74.

In the instant case, evidence existed arguably exonerating Greco of a different but potentially related crime. If considered as exculpatory evidence in relation to the second crime for which the warrant actually issued, then, unlike Lewis' defendants' conduct is a knowing versus a negligent omission. At issue is whether this information vitiates an otherwise unassailable finding of probable cause.

Under plaintiff's view of the case, the fact of the May 5th robbery, defendants' theory that it was committed by the same man, and the statements of Pamela Greco and Delores DeFrancesco should have been included in the application. His argument does not stop at this point, however. Plaintiff maintains that

> [i]n applying for a warrant for plaintiff's arrest, the defendants carefully avoided making any reference whatever to the . . . exculpatory evidence, thus concealing from the issuing judge evidence that plaintiff was innocent of the crime for which they sought the warrant.

Memorandum ¶ 4 (Mar. 28, 1988) (emphasis added). If, as plaintiff concludes, defendants knew Greco was innocent when they sought the arrest warrant, it would be reasonable to conclude, as plaintiff alleges, that "[t]he deliberate and intentional omission of this information from the affidavit was done recklessly and with the intent of misleading and deceiving the judge who signed the warrant for plaintiff's arrest. . . ." Complaint ¶ 18.

In this case, the underlying facts are undisputed. An eyewitness and relative of Greco stated that he did not commit the earlier of two robberies at the same store,

robberies arguably committed by the same man. This information clearly does not establish Greco's innocence in the second robbery. Plaintiff ignores the fact that surveillance cameras recorded the crimes and that an impartial witness positively identified Greco as the perpetrator of the May 30th crime. The information might serve to raise a reasonable doubt as to his conviction for either or both crimes. The issue, however, is probable cause to arrest. Plaintiff's characterization of the defendants' "knowledge and belief" of plaintiff's innocence goes well beyond the facts in this case or any reasonable inference to be drawn from those facts. Greco was neither arrested nor prosecuted for the May 5th robbery, the crime his cousin said he did not commit. Defendants' Exhibits C-5 (Information); C-7 (Warrant Application); C-26 (Polygraph Examination Results). Taken as a whole, the omission of the information regarding the earlier crime does not vitiate the probable cause finding supporting the warrant for the May 30th robbery.

Because plaintiff failed to satisfy the *Franks* standard, summary judgment must enter for defendants Howard and MacDonald. Even were this not the case, defendants' qualified immunity for discretionary functions shields their conduct in this case. In the Second Circuit, this defense exists in three ways.

> First "the defense should be sustained if the court finds that it was not clear at the time of the official acts that the interest asserted by the plaintiff was protected by a federal statute or the Constitution." Second, "even if the interest asserted by the plaintiff was clearly of a type generally protected by federal law, the defendant is entitled to immunity as a matter of law if it was not clear at the time of the acts at issue that an exception did not permit those acts." Third, "even if the contours of the plaintiff's federal rights and the official's permissible actions were clearly delineated at the time of the acts complained

> of, the defendant may enjoy qualified immunity if it was objectively reasonable for him to believe that his acts did not violate those rights."

Walsh v. Franco, 849 F.2d 66, 69 (2d Cir. 1988) (citing *Robison v. Via*, 821 F.2d 913, 920-21 (2d Cir. 1987)). Given the clear constitutional mandate of probable cause for arrest and for truthfulness by official affiants seeking a warrant, only the third *Robison* method applies in this case. This method is "fact-specific," *id.* at 70, but the Supreme Court has determined that a police officer's "shield of immunity [will] be lost" "[o]nly where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable." *Malley v. Briggs*, 475 U.S. 335, 344-45 (1986). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Id.* at 341.

As noted earlier, plaintiff's view of the case is colored by his contention that Howard and MacDonald *knew* Greco was innocent when they sought the arrest warrant. This conclusion simply is not supported by the undisputed facts in this case. On the issue of qualified immunity, the inquiry becomes one of "objective reasonableness, designed to 'permit the resolution of many insubstantial claims on summary judgment.'" *Robison*, *supra*, 821 F.2d at 920 (citing *Harlow*, *supra*, 457 U.S. at 818). Would a reasonably well-trained detective in defendants' position have known that the omissions from the affidavit vitiated any probable cause determination? *See Malley*, *supra*, 475 U.S. at 345. Defendants are entitled to qualified immunity "if the undisputed facts and all permissible inferences favorable to the plaintiff show . . . that officers of reasonable competence could disagree on whether the probable cause test was met." *Robison*, *supra*, 821 F.2d at 921.

In this case, defendants had a positive identification of Greco by an impartial victim of and eyewitness to the May 30th robbery. They had a surveillance tape that

served as the basis for selecting Greco's photo. They also had a theory, echoed by the store's owner, that the same person committed both the May 5th and May 30th crimes. The victim of the May 5th incident stated unequivocally that Greco did not commit that crime. As his cousin, it is reasonable to assume she would recognize him. On the issue of probable cause to arrest for the May 30th robbery, direct evidence tied Greco to the crime and other evidence, by inference, suggested that another person might be guilty. These circumstances are not "so lacking in indicia of probable cause as to render official belief in its existence unreasonable." *Malley, supra*, 475 U.S. at 344-45. The court continues to hold that probable cause existed under these circumstances as a matter of law. Even if this conclusion is erroneous, however, the undisputed facts suggest that, at a minimum, "officers of reasonable competence could disagree" regarding the existence of probable cause. Accordingly, qualified immunity shields defendants' conduct in arresting plaintiff for the May 30th robbery. Again, summary judgment for Howard and MacDonald is appropriate.

C. *Post-Arrest Issues*

The conduct of Howard and MacDonald after effecting Greco's arrest also is challenged by plaintiff. Williams recanted his identification of Greco upon viewing him in person at the police station. Contrary to plaintiff's assertions, this did not prove that Greco was innocent, particularly because Williams apparently was brought to the police station by Greco's family. The event raises issues concerning the decision to prosecute and to require bail for Greco.

Plaintiff has not sued the prosecutor, whose absolute immunity would bar any civil damages action. *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976). Plaintiff's unsubstantiated claim is that defendants withheld exculpatory evidence from the prosecutor. Defendants disagree. In his affidavit, Detective Howard avers that

> 8. . . . . I spoke to Mr. Greco at the time and I told him that although by law I did not have the authority to unarrest him, I would do my best to see to it that his life was interfered with as little as possible while we continued our investigation in order to determine whether we had the wrong individual. I also told him that I would call the prosecutor and ask him to put off taking any action on this case for a period of time pending further investigation.
>
> 9. A day or two later, I called Mr. Edward Malarkey, who was then the prosecutor at the Sixth Circuit Court in New Haven. I explained to Mr. Malarkey that we had made an arrest on the basis of a positive I.D. and that we now seemed to have a witness who doubted that I.D. I therefore asked Mr. Malarkey to put off action on the case to allow us to continue our investigation. He agreed to do so, and I told him that I would remain in touch with him as our investigation progressed. I also stated I would send a written follow-up report to him.

Howard Aff. ¶¶ 8, 9. Detective Howard's written report was dated June 14, it was typed on June 24, and it was signed by him on July 1, 1983. It is part of the file for the State's Attorney. Defendants' Exhibit C-42. Plaintiff has adduced no evidence to support his claim that Howard's oral or written reports were not brought to the prosecutor's attention on a timely basis. As to the availability of the information to Greco and his attorney, his motion for discovery was not filed until August 24, 1983, over ten weeks after his arrest. Defendants' Exhibit C-15, ¶ 15 (Motion for Discovery; Request for Exculpatory Information). Gary Alexander was arrested on August 22, *id.* C-34, and the case against Greco was dropped on August 31. *Id.* C-1. There simply exists no factual basis for plaintiff's claim that defendants "withheld" exculpatory information from him.

On the issue of excessive bond, plaintiff's claims of a violation of his eighth amendment rights stand in stark contrast to those in *Wagenmann v. Adams*, 829 F.2d 196, 211-13 (1st Cir. 1987), upon which he relies. The court must again stress that the claim that defendants "knew and believed" that plaintiff was innocent but set a bond anyway is a mischaracterization of the facts. Defendants had probable cause to arrest Greco. This did not exist in *Wagenmann*. *See* 829 F.2d at 206-09 (arrest based on unsubstantiated statements and suspicions of prominent local family). Like *Wagenmann*, defendant Howard, who could not directly set bail, nevertheless interceded and affected the bail requirement. Unlike *Wagenmann*, the evidence in this case is that the bail was lowered substantially from the standard for armed robbery. In contrast, the *Wagenmann* defendants deliberately sought a high bail, disproportionate to the crimes involved, by manipulating the court clerk responsible for setting bail. *Id.* at 212.

The court concurs with plaintiff insofar as he notes that his inability to make bail is an irrelevant question. *Id.* at 213. Other facts militated toward setting a bail requirement in this case. Greco had no significant ties to the community. He was unmarried, living with a girlfriend in her home. Defendants' Exhibit C-32. No evidence suggests that he had children or owned property. Greco had a history of scrapes with the law, some of which were drug-related. *Id.* C-21 to 24. In this case, Greco was charged with a very serious crime, armed robbery. Nevertheless, the State's key evidence, the eyewitness identification, was cast into doubt when Greco's bail was set. Howard contends, and plaintiff does not dispute, that the bail requirements for armed robbery span $10,000 to $25,000. Howard Aff. ¶ 8. Bail in the amount of $3,000 was imposed. No suggestion is made, however, that this was "an amount engineered purposefully to guarantee continued confinement." *See Wagenmann, supra*, 829 F.2d at 213. Nor is any suggestion

made that the bail determination occurred in a system rife with conspirators seeking to deny Greco his constitutional rights. *Cf. Bretz v. Kelman*, 773 F.2d 1026, 1030-32 (9th Cir. 1985) (en banc) (stating § 1983 claim on such allegations). Plaintiff's claim that the $3,000 bail is unreasonable must derive from his belief that something less would be reasonable. Plaintiff has marshalled neither the facts nor the legal authority to support this contention. The court concludes that "a fair-minded jury could [not] return a verdict for the plaintiff on the evidence presented." *Anderson, supra*, 477 U.S. at 252. Summary judgment on the excessive bail question is appropriate.

On the issue of the dissemination of information concerning Greco's arrest to other police departments, summary judgment is also appropriate. The constitutional dimension of this alleged tort escapes the court. Clearly damage to Greco's reputation alone under a defamation claim is not actionable under § 1983. *Paul v. Davis*, 424 U.S. 693, 701 (1976); *Reilly v. Leonard*, 459 F. Supp. 291, 296-300 (D. Conn. 1978).

The court holds, therefore, that plaintiff's attempt to challenge his post-arrest treatment by defendants Howard and MacDonald must fail on factual and legal grounds.

D. *Summary Judgment as tho Defendants Kowats, Russo, Bensey, and Krafick*

These defendants are Fairfield police officers. Plaintiffs' complaint contains few factual allegations against these people, Complaint ¶¶ 33-42, and his memoranda contain no factual renditions or legal analysis concerning their posture in this case. The court, therefore, accepts defendants' facts as set forth in their sworn affidavits as true.

According to these defendants, they were involved, in various capacities, in investigating the armed robbery of a local fast-food store, which occurred on June 8, 1983.

Officer Bensey, the patrol officer who initially interviewed the victims of the robbery, has no other connection with this matter and summary judgment is granted as to him. The information gleaned from the victims was provided to the National Crime Information Center. Detective Kowats was directed to the New Haven police department for a crime occurring under similar circumstances, based on the arrest of George Greco, Jr. Photo arrays containing Greco's picture once again led to positive identifications of him as the perpetrator by eyewitnesses to the Fairfield crime. It also is appropriate to enter summary judgment for Detective Russo, whose only connection with these proceedings was to show the photo array to an eyewitness and to record his positive identification of Greco. Based on the sworn statements of two eyewitnesses, Detective Kowats applied for and received a warrant for Greco's arrest, which he executed with Detective Krafick's asisstance on June 29, 1983. Kowats received notification from the New Haven police department that one Gary Alexander confessed to the June 8th robbery. Each of his eyewitnesses recanted upon viewing Alexander's photo in a photo array, and the charges against Greco subsequently were dismissed.

The basis of plaintiff's claim against these defendants is unclear. He alleges that they (presumably all four men) knew that no probable cause existed to believe that Greco committed the May 30th robbery in New Haven and that they suppressed this exculpatory evidence when obtaining the arrest warrant for the June 8th incident. Complaint ¶¶ 34-35. This unsubstantiated claim completely lacks a factual foundation and flies in the face of a sworn statement to the contrary by Kowas that the warrant was based on eyewitness identifications of Greco. Plaintiff makes no claim that defendants are liable for relying on data provided by the National Crime Information Center. Rather, Greco implies that the probable cause finding is vitiated by questions concerning the May 30th arrest in New Haven. There is no claim that these defendants knew that Williams recanted his iden-

tification of Greco. Even if Williams's change of heart somehow could taint the probable cause question concerning the Fairfield robbery, plaintiff offers no authority to suggest that these defendants were obliged to investigate independently the May 30th incident. There is no suggestion that Greco's arrest warrant in Fairfield was based on the fact of the New Haven arrest. Rather, the information served to focus the defendants' investigation. The eyewitness identification established probable cause. These defendants, at most, were negligent in their investigation. Negligence is not a basis for a § 1983 claim. *Daniels v. Williams*, 474 U.S. 327 (1986). Summary judgment must enter for Kowats, Russo, Bensey, and Krafick.

CONCLUSION

The arrests of plaintiff Greco on two armed robbery charges of which he was innocent, on the basis of misidentification by the victims of the respective robberies, is tragic, doubtlessly causing him embarrassment, anxiety and financial expenditures for bail and defense. But, on the basis of the submissions of the defendants, which plaintiff elected not to counter with affidavits or other evidentiary material sufficient to raise a material factual issue, plaintiffs' constitutional rights were not violated. Accordingly, the motions of defendants Howard, MacDonald, Kowats, Russo, Bensey and Krafick for summary judgment are granted. Having disposed of the federal claims in this matter, the court declines to exercise pendent jurisdiction over plaintiff's undefined state claims.

SO ORDERED.

/s/ Ellen Bree Burns
ELLEN BREE BURNS
Chief Judge
United States District Court

Dated at New Haven, Connecticut, this 24th day of April, 1989.